and specificity with which standing is pleaded reflects the concern of Harrington's counsel that standing will be an important threshold issue in the case. However, even if he is held to have standing, the case might nonetheless be dismissed on "political question" grounds.

(3) Congressional Grant of Standing to Sue

It seems clear that if there is to be effective control of domestic surveillance activities of the CIA, standing to sue will have to be given to individual citizens who have been the targets of such activity.

An analogy can be made to military surveillance of civilian political activities.[168] In our view, the domestic surveillance activities of the CIA, like those of the Army, exceeded its statutory authority. Some of the reported activities such as warrantless electronic surveillance would of course be unconstitutional even if not contrary to statute, if they involve domestic security. But the decision of the Supreme Court in *Laird* v. *Tatum*, 408 U.S. 1 (1972), requiring a showing of direct injury or the threat of imminent injury, makes it difficult, if not impossible, effectively to control such surveillance activities under present law.[169]

It seems clear that if there is to be ef-

The proposed Freedom From Surveillance Act of 1973 (S. 2318, 93rd Congress, 1st session) which would prohibit surveillance by the military, serves as an excellent model of the type of legislation which appears to be needed with respect to CIA activities impinging upon the rights of individual citizens. The proposed statute first sets forth a broad, but nonetheless precise, description of the prohibited activities and the penalties imposed and then narrowly describes the exceptions to the general rule.

New legislation which would not only impose sanctions [170] but would give targeted citizens standing to sue is, therefore, clearly desirable. Such persons should be granted the following rights, at a minimum:

1. The right to bring a civil action for damages (including punitive damages) and/or for equitable relief regardless of the actual amount of pecuniary damage suffered.

2. The right to recover attorneys' fees if plaintiff substantially prevails.

3. The right to bring suit in the district where the violation occurs, where plaintiff resides or conducts his business, or in the District of Columbia.

Other provisions which might be considered would be: giving any case brought pursuant to the statute docket precedence and requiring the Government to answer the complaint within thirty days rather than sixty days.[171] The proposed Freedom From Surveillance Act, *supra*, also includes a provision authorizing class actions to enjoin surveillance by the military, and such a provision would seem to be equally desirable in the case of the CIA.

Finally, in view of the trepidation with which the courts have habitually dealt with matters relating to national security and foreign relations, particularly where the CIA is involved, it might be desirable to include provisions expressly granting the trial court power to review *in camera* relevant documents as to which a privilege is claimed (this power is now granted under the Freedom of Information Act, as recently amended) and making clear plaintiff's right to ascertain through speedy and effective discovery procedures whether improper domestic surveillance has, in fact, occurred.

B. Stricter congressional oversight

As a result of disclosures concerning CIA domestic and foreign activites, many bills and resolutions have been introduced in Congress to define and limit the CIA's functions, to restrict its domestic operations and to provide for more effective congressional oversight over its foreign political activities.[172]

It is easier to agree in principle that each of these is desirable than to put in statutory form a clear, workable application of the principle. We will discuss below some of the approaches presented.

(1) Domestic activities

A number of bills seek to climinate domestic surveillance operations. In S. 3767, 93rd Cong., 2nd Sess. (1974), the CIA is specifically unauthorized to:

"(1) carry out, directly or indirectly, within the United States, either on its own or in cooperation or conjunction with any other department, agency, organization, or individual any police or police type operation or activity, any law enforcement operation or activity . . ."

In addition, the CIA would not be permitted to:

"(2) participate, directly or indirectly, in any illegal activity within the United States."[173]

Others (e.g. S. 2597 93rd Cong., 1st Sess. [1973]) create exceptions for "carrying on within the United States activities necessary to support its foreign intelligence responsibilities." This would appear to provide a broad loophole which would not effectively bar such activities as opening the mail of Bella Abzug while she was a practicing attorney, and keeping counter-intelligence files on her activities and those of three other members of Congress (see Point 11B, *supra*).

Some members of the Committees preparing this report believe that such an exception would be appropriate if it were coupled with a *proviso* that internal security functions in support of foreign intelligence activities would be impermissible.

(2) Congressional Review of Foreign Political Activities: Prior Approval or Later Disclosure

The amendment to the Foreign Assistance Act of 1961, enacted as Public Law 93-559, Dec. 30, 1974, adding Sec. 663, requires only a report by the President as to CIA foreign operations "other than activities intended solely for obtaining necessary intelligence," to the appropriate committees of Congress, including the Senate Foreign Relations and the House Foreign Relations Committees. This Act does not, however, mandate authorization by Congress or any committee.

Some of the proposed legislation goes farther. H.R. 9511, 93rd Cong., 1st Sess. (1973), would prevent "covert" action without written approval of an oversight committee of Congress. "Covert" action is inadequately defined as being "the commonly accepted understanding of that term within the intelligence community of the Federal Government."

In H.R. 16,905, 93rd Cong., 2d Sess. (1974), funds are not to be appropriated for intelligence activities unless such operations are authorized by further legislation. The approach of this bill is to set up a congressional council which would have powers somewhat similar to the National Security Council. The limitation imposed by requiring authorization of intelligence operations by legislation enacted after the date of this Act would have consequences perhaps unintended by the draftsmen. It would appear that the CIA cannot receive funds for any activity unless Congress as a whole so authorized by vote, which would in effect impair any secret operations including intelligence-gathering.

(3) Composition and Powers of Oversight Committees

Many different approaches have been suggested as to the composition of a joint committee to oversee the Agency's operations.

[illegible] seven from the House and seven from the Senate, each to be divided among the two parties (H.R. 16,905); another seeks twenty-five members (S. 1547, 93rd Cong., 2nd Sess. [1974]).

In H.R. 16,905, the joint committee is authorized to conduct continuing studies and investigations of all security agencies, namely, the CIA, FBI, Secret Service, Defense Intelligence Agency, the National Security Agency and all other intelligence departments and agencies of the Federal Government.

Other bills have sought (1) detailed and regular reports to congressional committees (H.R. 7596, 93rd Cong., 1st Sess. [1973]); (2) increased powers of congressional committees to obtain as a matter of law, further information from the CIA (H.R. 13,798, 93rd Cong., 2nd Sess. [1974]) "Central Intelligence Agency Disclosure Act");[174] and (3) further study and correlating of information available to Congress relating to intelligence (S. Con. Res. 23, 93rd Cong., 1st Sess. [1973]).

It is apparent that congresional oversight has many variations. Regular reporting and submission of a proposed budget to a carefully organized joint committee representing all segments of Congress, should be a minimum.

VI. RECOMMENDATIONS

1. Despite the present restriction of the CIA to the foreign intelligence field and despite the prohibition against its exercising any internal security functions, its domestic activities—viewed as legitimate by the Agency—so pervade our national life and society as to make such restriction and prohibition almost meaningless. A revision of the National Security Act so as to define more precisely both the authority of, and the restrictions on, the Agency is plainly necessary.

Legislation for this purpose referred to in CIA Director William E. Colby's report to the Senate Appropriations Committee as acceptable to the CIA is inadequate. This legislation would add the word "foreign" before the word "intelligence" wherever it appears in the Act, and would add a prohibition against "any domestic intelligence operations or activity" to the existing ban against the exercise of police, law-enforcement or internal security functions. However, this prohibition would be "supplemented" by an additional proviso preserving for the CIA the right to carry on within the United States any activity "in support of its foreign intelligence responsibilities . . ."[175] It is difficult to determine which of the domestic activities now regarded by the CIA as not prohibited even though they appear to involve internal security functions, would be curtailed under such a proviso.

It is recommended that new legislation be formulated, which would (a) clearly define the terms "internal security operation" and "domestic intelligence operation" in accordance with Recommendations 2 and 3 below, and (b) permit no exceptions to the ban on such operations by the CIA.

2. In light of recent testimony about CIA domestic activities, special attention should be given in any new legislation to the protection of First and Fourth Amendment rights of speech, association and privacy. In our view, CIA surveillance within the United States of any person who is not an employee of the CIA constitutes an "internal security function" prescribed by its present charter. Equally unlawful is the CIA's maintenance and dissemination of information concerning individuals in this country with no clear and direct involvement with foreign powers. Such CIA activities have a serious potential for infringement of First Amendment rights and are not necessary to the Agency's authorized objectives.

In addition, the exemption of the CIA from the restrictions contained in the Privacy Act of 1974 should be revised. That Act provides that only *citizen* or *resident*

Footnotes at end of article.

alien about whom records are kept by a federal agency may inspect and make copies of such records, request corrections, and add to the records a statement of the reasons for his disagreement if the agency refuses to make such corrections. Exceptions to the requirement of allowing individuals to inspect and correct their own records are made, *inter alia*, for (a) investigative material compiled by a law enforcement agency; (b) information specifically authorized by Executive order to be kept secret in the interest of national defense or foreign policy; and (c) records maintained by the CIA. The total exemption for any records kept by the CIA constitutes a broad and unnecessary loophole which severely weakens the protection to individual privacy which the Act otherwise affords. This exemption should be limited to cases where the CIA can demonstrate that the individual making the request has a clear and direct connection with a foreign power.

3. The responsibility placed upon the Director to protect intelligence sources and methods from unauthorized disclosure should be eliminated. Mr. Helms and Mr. Colby disagree as to how the present provision is to be interpreted, but however interpreted, the provision has been used to justify CIA domestic activity—such as the Ellsberg profile, the insertion of CIA agents into domestic "dissident" groups, and CIA investigations within the Government of unauthorized disclosures of classified intelligence—which in our view conflicts with the prohibition against the exercise by the CIA of internal security functions. This domestic activity is premised on an overly broad definition of "intelligence" which encompasses not only CIA files and sources, but all Government documents and sources. Any protection of domestic sources and methods other than routine safety measures which may be necessary must be carried out by the FBI. With regard to sources and methods outside the United States, the authority to protect them is implied as part of the Agency's intelligence-gathering function.

4. Neither the National Security Act of 1947 nor the Central Intelligence Act of 1949 contains any express authority for the CIA to undertake foreign political operations. The amendment to the Foreign Assistance Act requiring the President promptly to report any such operation to the appropriate congressional committees represents an attempt to increase the CIA's accountability to Congress for its overseas activities. Congress has a constitutionally-based responsibility as a partner with the Executive in the establishment of foreign policy; the oversight committee should therefore consider any CIA political operation in the light of the foreign policy goals of Congress. If the committee members find that a particular CIA activity may conflict with these goals, congressional policy should be ascertained without revelation of specific details to Congress as a whole.

In order for the appropriate congressional committee to exercise its oversight responsibilities effectively under the 1974 amendment to the Foreign Assistance Act, the Act should be amended to require that the President's report on any proposed foreign political activity be defined to include a detailed proposed budget to be followed at a later date by an account of actual expenditures. Such a budget could assist the committee members in analyzing the scope and objectives of the proposed operations.

5. The funding process for the CIA is unique, in that the annual budget is discussed and voted upon only by one intelligence sub-committee of the Appropriations Committee in each house and is then divided up by the committee chairmen and disguised in various other appropriations so that the Appropriations Committee and the Congress as a whole do not know when, much less what total amount, they are voting for the CIA budget. However, the Constitution requires that at least the total budget must be separately and knowingly appropriated by Congress. The Constitution further requires the Executive to make a regular statement or account of all public money spent; thus, the total sum actually disbursed by the CIA should be published in the Combined Statement.[17]

The entire CIA budget should be reviewed by the joint congressional committee responsible for CIA oversight. This committee should be equipped with an adequate information-gathering staff and with enough professional accountants to allow it to perform meaningful budgetary review, and should require regular and special reports from the CIA. Budget oversight by this committee should include serious study of the CIA's proprietary corporations.

6. The legislation required to implement the above recommendations should confer standing to sue on injured citizens, such as those who have been the objects of surveillance. The holding of the Supreme Court in *Laird* v. *Tatum* to the effect that Government surveillance does not in itself create a chilling effect on First Amendment rights, has diminished still further the likelihood that a citizen who has been the object of CIA surveillance would be accorded standing under current constitutional standards, and has augmented the need for a new statutory enactment. It should be understood, however, that such legislation must not be interpreted as detracting from any presently established substantive rights, whether statutory or constitutional.

Committee on Civil Rights

Maria L. Marcus, *Chairman.*
Ann Thacher Anderson.
Charles R. Bergoffen.
Paul H. Blaustein.
Franklin S. Bonem.
Constance P. Carden.
Seymour Chalif.
Robert J. Egan.
James J. Fishman.
Benjamin Ira Gertz.
Joel B. Harris.
George M. Hasen.
David L. Katsky.
Alexander A. Kolben.
Larry M. Lavinsky.
Joseph H. Levie.
Edith Lowenstein.
Cyril H. Moore, Jr.
Bruce Rabb.
Jerry Slater.
William Sterling, Jr.
Franklin E. White.

Committee on International Human Rights

William J. Bulter, *Chairman.*
George G. Adams, Jr.
Robert Belt.
Benjamin B. Ferencz.
Richard N. Gardner.
Albert H. Garretson.
Robert Hornick.
Richard Paul Kramer.
Andre W. G. Newburg.
Allan S. Parter.
Ronald Pump.
Deborah L. Seidel.
Edward Sheldon Stewart.
Leonard M. Wasserman.
Richard A. Whitney.
H. Donald Wilson.

Dated: March, 1975.

FOOTNOTES

[1] See, *e.g.*, letter dated 4/25/47 from Allen Dulles to Chan Gurney, Chairman of the Committee on Armed Forces, reproduced in *National Defense Establishment* (*Unification of the Armed Services*) *Hearings before the Committee on Armed Services, United States Senate, 80th Cong., 1st Sess. on S. 758*, at 524.

[2] Wise & Ross, The Invisible Government (New York, Random House, 1964) at 91–93. With the creation of the OSS, the United States for the first time became engaged in intensive strategic intelligence research, and extensive and covert activity, on a world-wide scale. Ransom, Central Intelligence and National Security (Cambridge, Harvard Press, 1958) at 64.

[3] Hillsman, Strategic Intelligence and National Decisions (1956) at 29. The Joint Chiefs of Staff are credited with developing the plan eventually adopted by President Truman in the Statement of Lt. Gen. Hoyt S. Vandenberg, Director of Central Intelligence, reproduced in *National Defense Establishment*, *supra* at n. 1, 491, 494.

[4] Presidential Directive of 1/22/46, 3 C.F.R. 1080 (1943–48 Comp.). See 11 Fed. Reg. 1337, 1339 (2/5/46); Kirkpatrick, The Real CIA (1968) at 74; Ransom, *supra* at n.2, at 75.

[5] Wise & Ross, *supra* at n.2, at 93; Walden, *The C.I.A.: A Study in the Arrogation of Administrative Powers*, 39 Geo. Wash. L.Rev. 66, 70 (1970).

[6] Wise & Ross, *supra*, at 93; Walden, *supra* at n.5, at 70.

[7] Walden, *supra*, at 71.

[8] H.R. Rep. No. 2734, 79th Cong., 2d Sess. 4 (1946); see, Walden, *supra*, at 70–72.

[9] 50 U.S.C. § 401 *et seq.*

[10] Rear Admiral Roscoe H. Hillenkoeter became its first Director on September 15, 1947.

[11] 50 U.S.C. § 403(c) (1964); Walden, *supra*, at 73.

[12] 50 U.S.C. § 403(c) (1964); Ford, Donovan of OSS, (Boston, Little Brown & Co., 1970) at 316–17. Professor Walden notes that heads of other government agencies were authorized in 1950 to suspend any employee "when deemed necessary in the interest of national security," 5 U.S.C. § 22–1 (1964), but the broad authority granted to the Director of Central Intelligence is paralleled only by that conferred upon the Secretary of Defense with respect to employees of the National Security Agency, 50 U.S.C. § 833 (1964). Walden, *supra*, at 74.

[13] 50 U.S.C. § 403a–§ 403j (1964).

[14] *Id* at § 403g.

[15] *Id* at § 403j(b).

[16] In other words, the Director can spend money from the CIA's appropriations on his personal voucher. The CIA is said, however, to have taken administrative measures strictly to control its expenditures and to require a complete internal accounting for the use of all its funds, vouchered or unvouchered. Ransom, *supra* at n.2, at 81, 263, n.5. See Dulles, The Craft of Intelligence (New York, Harper & Row, 1963) at 259.

[17] 50 U.S.C. § 403(h).

[18] *Id.* at § 403(d)(5). See *e.g. Hearing before the Committee on Armed Services, United States Senate, 93rd Cong., 1st Sess., on Nomination of William E. Colby to be D.C.I., at* 14, 19.

[19] Wise & Ross, *supra*, n.2 at 94–5; Marchetti & Marks, The C.I.A. and the Cult of Intelligence (New York, Knopf, 1974) at 22–23. According to one authority, the NSC gave the CIA responsibility for "political, psychological, economic and unconventional warfare operations," Harry Rositzke, "America's Secret Operations: A Perspective," 53 *Foreign Affairs* 334, 341 (1975). The CIA's real role is therefore spelled out in a series of top-secret NSC directives ("NSCIDs"). Marchetti & Marks, *supra*, at 323. The fact that the Director participates in NSC meetings suggests that the scope of Agency operations may be largely self-determined. Ransom, *supra* at n.2, at 82.

[20] According to Marchetti & Marks, *supra*, at 22, this was accomplished by means of a secret National Security Council Director, NSC 10/2.

[21] Marchetti & Marks, *supra*, at 23.

[22] Id.

[23] *Id.* at 58; see Schwartzman, *infra* at n.86, at 493 n.1.

to leave a mess. The basic principle of intelligence operations is deniability—to insulate the President from responsibility—to make it appear that this government isn't doing what it is doing—to make sure the buck doesn't stop with the responsible officials in our government. Deniability is the enemy of accountability.

As a result, it is possible to conclude that the agencies are often off on their own like a "rogue elephant." But there is a suspicion possibly unjustified that the rope was slipped off the elephant by the Chief of the Park Service himself.

The truth is that the system is designed so that it is too often impossible to ascertain the truth. The truth is that the system is unacceptable.

We have found examples in which Presidents have used our intelligence agencies to secretly exceed their authority under the law and the Constitution.

We have found cases in which the agencies have, apparently on their own, exceeded or violated Presidential orders. The case of the CIA's failure to destroy its biological weapons—the shellfish toxin—is a small, but illustrative, example.

We have found that the agencies have sought Presidential authorization of illegal actions in which they were already engaged—the Huston Plan is a case in point.

It seems that the possibilities are endless. And as far as I can tell, they all happened.

What can be done about the problem of accountability? What can be done to meet the problems I have outlined? My answers are still tentative and are certainly subject to revision as we go further in our investigation. But I wanted to spell out some ideas in order to begin the dialogue on the kind of fundamental changes that I believe are required.

I would suggest consideration of the following steps:

(1) First, I would suggest taking the clandestine services, the spys, the covert operators, the whole "dirty tricks" department—out of the CIA. This is the only way to get effective control over these activities.

There have been many suggestions to take such covert action—the overthrowing of foreign governments, all that sort of thing—out of the CIA, but to leave the covert collection, or espionage job, in the Agency. We have been taking a close look at that, and it's frankly impractical. You really can't draw a line between espionage and covert action.

People who will give you information and betray their country in that manner will also do odd jobs for you later on, if you want some covert activity. Moreover, the whole apparatus of secrecy—safe houses, secret writing, clandestine contacts—is the same in both cases.

We would be fooling ourselves if we tried to exert control over covert action and ignored the fact that the same kinds of things are done under different labels, such as intelligence, or even more, counterintelligence.

(2) This whole covert side of our intelligence operations should be made accountable to a politically responsible official of the Executive branch, such as the Secretary of State. We should abolish these phantom groups—the most recent of which is the 40 Committee—that are supposed to exercise control but which, in reality, serve to insulate the most senior officials and the President from accountability. A new Cabinet-level body, chaired by the Secretary of State, should sign off on *all* our clandestine activities abroad, including intelligence and counterintelligence, which at present receive no systematic high-level review. Accountability would replace deniability—which was a naive and unworkable concept anyway—and seasoned and sober judgments would hopefully replace reckless and impractical ones.

(3) In the field, we have to make the American Ambassador fully responsible for all the intelligence operations that are going on in his country. Otherwise, we can exert all the control we like in Washington, but we will have no assurance that in fact control is being exercised.

Some might argue that there are certain Ambassadors who can't be trusted with this kind of information. Well, my view is that maybe this will lead to a better class of Ambassadors and end the practice of using our overseas posts for political payoffs.

(4) I believe we must make the budget for these clandestine activities come out of the State Department and the Defense Department budgets and be subject to strict impersonal authorization. That way, we can help assure that secret intelligence operations are truly essential to our defense or our diplomacy.

(5) I believe we should consider reducing our overseas complement of the clandestine service substantially over the next several years. I believe these slots should be transferred to the Foreign Service so it can do a better job of political and economic reporting on an open basis. All agencies agree that the primary and most valuable source of intelligence, apart from our technical systems, comes from the Foreign Service. Yet they are badly hamstrung by lack of personnel training and operating funds. I believe a special account for these purposes must be added to the State Department budget.

(6) This doesn't mean that we should abolish the Director of Central Intelligence. Quite the contrary. His role should be strengthened. He should continue his responsibilities as the central point of analysis for all intelligence information and have greater authority to manage the technical collection programs. In addition, he should be given basic managerial responsibilities over the budget of the intelligence community.

Only in that way can our requirements for intelligence really be linked-up with the way we spend our money. As it stands now, there is a tendency for each agency to get its share of the pie and go off on its own, doing what it knows how to do best, regardless of what the requirements are of the government as a whole. This, in fact, was the original role for establishing a Director of Central Intelligence to serve as a central point for analyzing information and for coordination and management.

(7) I believe the Director of Central Intelligence also should be given an explicit charge to keep the Congress informed of intelligence developments as they unfold. For the Congress to play its rightful role in the shaping of national policy, it must have as good information as the Executive.

(8) To reestablish the integrity of our national intelligence estimates, I believe we must restore some version of the Board of National Estimates. This board was abolished by Richard Nixon when he didn't like the news that he was getting from the intelligence community. It was a board of eminent and highly qualified intelligence analysts, diplomats and statesmen, who tried to come to some wise and sober judgments on the significance of our intelligence information.

Nothing is more important than having objective intelligence. But objective intelligence requires objective people, unfettered by fears for their careers and not susceptible to White House or parochial agency pressure. We need to reestablish a board that can perform that function.

(9) The intelligence agencies should have their rules clearly spelled out in law. We need to pass stiff laws that will attach tough criminal penalties to violations of their charters or of other laws of the United States. We have to make it as clear as we possibly can what activities are permitted by these agencies. We must make it equally clear that all other activities are forbidden unless explicitly authorized by Congress. We can't put ourselves in the position of trying to imagine and rule out all possible activities that could conflict with our principles and our Constitution. If additional authority is needed, it must be sought from the Congress for it.

(10) Finally, we must establish an effective Congressional oversight mechanism. I believe it is fair to say that if we had done a better job of oversight, we might have come to grips with these problems a great deal earlier. This oversight body, whether it be a joint Committee or separate Committees of the two Houses of Congress, should be composed of representatives from the other Committees responsible for these matters—Armed Services, Foreign Relations, Appropriations—as well as several members drawn at large from the two Houses. Membership of the Committee should rotate so that the Committee does not become captive to the intelligence community. A critical aspect of this oversight is that this Congressional Committee be allowed access to all relevant information. The unwillingness to trust a duly-constituted Congressional body with information relating to the intelligence of the United States betrays the same lack of trust of the democratic process that led to the abuse of the agencies by turning them against American citizens.

I believe there is no more fateful set of decisions to be made by the Congress in the field of foreign affairs than those that will be addressed by the Select Committee and ultimately by the Congress. No more important step towards reestablishing America's credibility and America's respect, and therefore America's power, can under effective control and accountability.

Moreover, it is essential for the continuation of democratic support for our involvement in foreign affairs. Only through the most careful safeguarding of our liberties will the American people again feel that their government deserves the trust so essential for the conduct of an effective foreign policy.

I am convinced that we can rebuild this trust only by ensuring that no one individual can abuse it. As James Reston has noted, "we have a system that we shrewdly designed to be strong enough for leadership, but in which power was diffuse enough to assure liberty." Through the reforms I have suggested, and others that may also be needed, I hope we could help assure both continued leadership and continued liberty.

But beyond these measures of institutional reform lie the ultimate questions of what kind of President, what kind of foreign policy we are to have. Regardless of institutional arrangements, it is very hard for the members of the intelligency community—or anyone else in the federal bureaucracy—to say "no" to the President. And it is almost impossible if the President invokes the imperatives of foreign policy and national security.

So it comes back to our basic approach to foreign policy. Will it be dominated by fear and suspicion? Will it be characterized by outsized ambition and an American solution to every problem? Will it be warped by the illusion that while we jealously control our own history the history of others can be manipulated by a few dollars, a few guns or a few lies?

Or will we approach the world with a more open mind and a more generous spirit? Will our leaders learn to live with democratic dissent at home and to accept diversity in our dealings abroad? Will we once again be the foremost example of liberty in the world?

I hope so. I believe it would restore a new measure of proportion and restraint to our future foreign policy.

Without this restraint, the entire structure and uniqueness of our democracy may be endangered.

With it, we will enter our third century of democracy better equipped to meet the chal-

Murphy
Commission
Recommendations

Approved For Release 2005/06/02 : CIA-RDP77M00144R001200050009-8

RECOMMENDATION (28)

Establishment of a National Security Review Committee (NSRC) to conduct a broad review, under the direction of the National Security Council principals, of the U.S. worldwide national security posture at the beginning of every new Administration. The review should involve the newly appointed senior officials and draw upon the views of the relevant departments. It should be directed by the President and his National Security Assistant.

***

I see considerable merit in the concept of a National Security Review Committee with membership as desired by the President, and would be prepared to provide such intelligence inputs as would be of use to a NSRC in its worldwide review of the U.S. national security posture.

Recommendation (1)

Section 403 of the National Security Act of 1947 should be amended in the form set forth in Appendix VI to this Report. (Reproduced in full on following page.) These amendments, in summary, would:

a. Make explicit that the CIA's activities must be related to foreign intelligence.

b. Clarify the responsibility of the CIA to protect intelligence sources and methods from unauthorized disclosure. (The Agency would be responsible for protecting against unauthorized disclosures within the CIA, and it would be responsible for providing guidance and technical assistance to other agency and department heads in protecting against unauthorized disclosures within their own agencies and departments.)

c. Confirm publicly the CIA's existing authority to collect foreign intelligence from willing sources within the United States, and, except as specified by the President in a published Executive Order[1], prohibit the CIA from collection efforts within the United States directed at securing foreign intelligence from unknowing American citizens.

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[1]The Executive Order authorized by this statute should recognize that when the collection of foreign intelligence from persons who are not United States citizens results in the incidental acquisition of information from unknowing citizens, the Agency should be permitted to make appropriate use or disposition of such information. Such collection activities must be directed at foreign intelligence sources, and the involvement of American citizens must be incidental.

Note: Appendix VI of the Commission Report provides:

In Recommendation (1), the Commission proposes that 50 U.S.C. Section 403(d) be amended to read (Additions are italicized; deletions are marked through):

(d) For the purpose of coordinating the foreign intelligence activities of the several government departments and agencies in the interest of national security, it shall be the duty of the (Central Intelligence) Agency, under the direction of the National Security Council--

(1) to advise the National Security Council in matters concerning such foreign intelligence activities of the government departments and agencies as relate to national security;

(2) to make recommendations to the National Security Council for the coordination of such foreign intelligence activities of the departments and agencies of the government as relate to the national security;

(3) to collect, correlate and evaluate foreign intelligence relating to the national security, and provide for the appropriate dissemination of such foreign intelligence within the government using where appropriate existing agencies and facilities:

Provided, that except as specified by the President in a published Executive Order, in collecting foreign intelligence from United States citizens in the United States or its possessions, the Agency must disclose to such citizens that such intelligence is being collected by the Agency.

Provided further, that the Agency shall have no police, subpoena, law enforcement powers, or internal security functions:

Provided further, that the departments and other agencies of the government shall continue to collect, evaluate, correlate and disseminate departmental intelligence:

~~And provided further, that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;~~

(4) to perform, for the benefit of the existing intelligence agencies, such additional foreign intelligence services of common concern as the National Security Council determines can be more efficiently accomplished centrally;

(5) to perform such other functions and duties related to foreign intelligence affecting the national security as the National Security Council may from time to time direct.

(6) to be responsible for protecting sources and methods of foreign intelligence from unauthorized disclosure. Within the United States, this responsibility shall be limited (a) to lawful means used to protect against disclosure by (i) present or former employees, agents or sources of the Agency or (ii) persons, or employees of persons or organizations, presently or formerly under contract with the Agency or affiliated with it, and (b) to providing guidance and technical assistance to other government departments and agencies performing intelligence activities.

Response

I fully concur in the recommendation of the Commission that the National Security Act be amended to clarify the duties of the Agency by inserting the word "foreign" before the word "intelligence" at appropriate places in the Act. In fact, this suggestion first arose at my confirmation hearing in 1973.

I concur with the added provisions clarifying the Agency's role in the collection of foreign intelligence from US citizens.

I have reservations about the proposal of the Commission to amend the Act to shift from the Director of Central Intelligence to the Central Intelligence Agency, responsibility for protecting intelligence sources and methods from unauthorized disclosure. The DCI, as head of the Intelligence Community, is well placed to protect the Community's interest in sources and methods of foreign intelligence, but CIA is less well suited to cover these matters as they affect other agencies. The proposed amendment could be read to diminish the DCI's coordinating function in the Intelligence Community. I believe the purpose of the Commission in recommending the change can be carried out by retaining some of the limitations in the proposed subparagraph (6) but assigning the responsibility to the Director of Central Intelligence.

In addition, changing the wording from "protecting intelligence sources and methods from unauthorized disclosure" to "protecting sources and methods of foreign intelligence from unauthorized disclosure" eliminates terminology which is well recognized and for which there is judicial interpretation and precedent in several cases.

I am also concerned that subparagraph (6) may not afford sufficient authority to protect intelligence sources and methods information under the Freedom of Information Act. That Act exempts from its mandatory exposure provisions matters "specifically exempt from disclosure by statute." Appropriate language should be included in subparagraph (6) to make clear that that subparagraph is an exemption statute for Freedom of Information purposes.

Recommendation (2)

The President should by Executive Order prohibit the CIA from the collection of information about the domestic activities of United States citizens (whether by overt or covert means), the evaluation, correlation, and dissemination of analyses or reports about such activities, and the storage of such information, with exceptions for the following categories of persons or activities:

a. Persons presently or formerly affiliated, or being considered for affiliation, with the CIA, directly or indirectly, or others who require clearance by the CIA to receive classified information;

b. Persons or activities that pose a clear threat to CIA facilities or personnel, provided that proper coordination with the FBI is accomplished;

c. Persons suspected of espionage or other illegal activities relating to foreign intelligence, provided that proper coordination with the FBI is accomplished.

d. Information which is received incidental to appropriate CIA activities may be transmitted to an agency with appropriate jurisdiction, including law enforcement agencies.

Collection of information from normal library sources such as newspapers, books, magazines and other such documents is not to be affected by this order.

Information currently being maintained which is inconsistent with the order should be destroyed at the conclusion of the current congressional investigations or as soon thereafter as permitted by law.

The CIA should periodically screen its files and eliminate all material inconsistent with the order.

The order should be issued after consultation with the National Security Council, the Attorney General, and the Director of Central Intelligence. Any modification of the order would be permitted only through published amendments.

Response

I concur in this recommendation.

Recommendation (3)

The President should recommend to Congress the establishment of a Joint Committee on Intelligence to assume the oversight role currently played by the Armed Services Committees.

Response

As you know, I concur in this recommendation.

Recommendation (4)

Congress should give careful consideration to the question whether the budget of the CIA should not, at least to some extent, be made public, particularly in view of the provisions of Article I, Section 9, Clause 7 of the Constitution.[1]

Response

In the past I have taken the position that this question should be resolved by the Congress but that I could not in good conscience recommend publication of all or part of the intelligence budget. I believe I must now recommend that the Agency budget and certain classified intelligence programs of the Department of Defense remain fully classified and nonidentifiable. I do this despite the recommendation of the Commission and its reference to Article 1, Section 9, Clause 7, of the Constitution.

With respect to the constitutionality of the present procedure, a recent attempt to litigate this question did not reach the substance; the litigant having been defeated on the issue of standing to sue. Richardson v. United States, 418 U.S. 166 (1974). There is, however, considerable historical precedent for budget secrecy, going back to debates in the Constitutional Convention, the use of a secret fund during the administrations of Washington and Madison, and a secret appropriations act in 1811. Congress most recently endorsed the secrecy of intelligence budgets in June 1974 when the Senate rejected an amendment to the Department of Defense Appropriations Act of 1975 which would have required that the total budget figure for intelligence purposes be made public. In addition, I believe that present procedures are fully in accord with the Constitution. Agency appropriations are an integral part of appropriations made by law and are reflected in the Treasury's Statement and Account of Receipts and Expenditures in compliance with the cited provisions of the Constitution.

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[1] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

On the merits of the question, aside from the constitutionality, my belief that this budget should remain secret is based on the following:

a. Public disclosure of Intelligence Community budget data, or the budgets of the individual agencies which make up the Intelligence Community, could provide potential enemies with considerable insight into the nature and extent of our activities.

b. Publication of part of the budget, as suggested by the Commission, would raise, in my view, extensive congressional debate as to what matters were included and what matters were not included in the published totals, leading to a rapid erosion of the secrecy of the portions withheld.

c. The same question would immediately arise with respect to the publication of the total CIA budget, a total Community budget, or any other figure covering "intelligence." An immediate requirement would be levied to explain precisely which of our intelligence activities were covered in the published total and which were not. As you know, this is a difficult matter to determine within classified circles due to the difficulty of determining at what point intelligence expenditures stop and operational expenditures begin (the radar on a destroyer; tactical air reconnaissance on the battlefield; the reporting as differentiated from the representational and other functions of attaches, foreign service officers; etc.).

d. Publication of any single figure with respect to intelligence would, in my view, quickly initiate curiosity and investigation by the press and others as to exactly how the figure was arrived at and what its component elements were. This is suggested by the history of disclosure of AEC budget materials and related information by both the Executive Branch and the Congress.

e. Publication of any figure with respect to intelligence will result in questions and discussions of any changes or trends developed in succeeding year figures. Any change in the basis on which the figure was computed or any change in its level will generate a demand for explanation and tend to reveal the details of the figure and programs supported by it.

Thus, I must recommend that the CIA budget and certain other highly sensitive intelligence programs remain classified and nonidentifiable [redacted] STAT

Recommendation (8)

a. The Office of Deputy Director of Central Intelligence should be reconstituted to provide for two such deputies, in addition to the four heads of the Agency's directorates. One deputy would act as the administrative officer, freeing the Director from day-to-day management duties. The other deputy should be a military officer, serving the functions of fostering relations with military and providing the Agency with technical expertise on military intelligence requirements.

b. The advice and consent of the Senate should be required for the appointment of each Deputy Director of Central Intelligence.

Response

I endorse this recommendation though I envision its implementation in somewhat different fashion. With the establishment of a Deputy Director charged specifically with CIA management and representation responsibilities, the other (military) Deputy could most effectively perform the functions cited in the Commission Report if he were primarily concerned with management of those Intelligence Community responsibilities given to me under the President's letter of November 1971. Thus, I would propose that the existing position of Deputy to the DCI for the Intelligence Community be the basis for defining the responsibilities of the military Deputy Director. Should expected congressional consideration of the DCI's role within the Intelligence Community produce significant changes in this role, this recommendation will obviously be affected. While it might be undesirable to specify this in legislation, I believe that the Deputy Director principally concerned with management of CIA should be both a civilian and a career Agency employee. This last comment in no way reflects upon the high quality of the military Deputy Directors who have served this Agency in the past; it merely reflects the experience that such an outsider is normally less able to conduct the detailed management of the Agency contemplated by the Commission's recommendation than is a career Agency employee. This is especially true in the case in which a career Agency employee has been the Director, as in such

situations there has been a natural tendency for management decisions to be made by the Director rather than delegated to the Deputy. CIA has, however, been exceedingly well served by the high quality of a number of Deputy Directors of military background who have made a unique contribution in intelligence matters for which they were particularly fitted as well as being excellent helpers and independent advisors to the Director, himself.

Recommendation (9)

a. The Inspector General should be upgraded to a status equivalent to that of the deputy directors in charge of the four directorates within the CIA.

b. The Office of Inspector General should be staffed by outstanding, experienced officers from both inside and outside the CIA, with ability to understand the various branches of the Agency.

c. The Inspector General's duties with respect to domestic CIA activities should include periodic reviews of all offices within the United States. He should examine each office for compliance with CIA authority and regulations as well as for the effectiveness of their programs in implementing policy objectives.

d. The Inspector General should investigate all reports from employees concerning possible violations of the CIA statute.

e. The Inspector General should be given complete access to all information in the CIA relevant to his reviews.

f. An effective Inspector General's office will require a larger staff, more frequent reviews, and highly qualified personnel.

g. Inspector General reports should be provided to the National Security Council and the recommended executive oversight body. The Inspector General should have the authority, when he deems it appropriate, after notifying the Director of Central Intelligence, to consult with the executive oversight body on any CIA activity (see Recommendation 5).

Response

I concur in this recommendation.

a. The status of the Inspector General can be raised as recommended, although I believe the other recommendations made by the Commission with respect to the functions of the Inspector General are more fundamental.

b. The Office of the Inspector General will be staffed by officers of the types described, both from inside the Agency and from outside the Agency.

c. The Inspector General will develop a program of periodic review of all offices within the United States as proposed.

d. The Inspector General will investigate all reports from employees concerning possible violations of the CIA statute and other applicable laws.

e. The Inspector General will be given complete access by specific regulation to all information in CIA relevant to his reviews.

f. The Inspector General is now studying the recommended expansion of his office and program and will develop a specific proposal for consideration.

g. Inspector General reports will be made available to the NSC and the recommended executive oversight body, as recommended.

Recommendation (13)

a. The President should instruct the Director of Central Intelligence that the CIA is not to engage again in domestic mail openings except with express statutory authority in time of war. (See also Recommendation 23.)

b. The President should instruct the Director of Central Intelligence that mail cover examinations are to be in compliance with postal regulations, they are to be undertaken only in furtherance of the CIA's legitimate activities and then only on a limited and selected basis clearly involving matters of national security.

Response

I concur in the intent of this recommendation, although in form it is directed to the President rather than the Agency. It is fully consistent with the instructions issued by me on 29 August 1973 and will be reflected in internal Agency regulations as well as instructions.

Recommendation (21)

The Commission endorses legislation, drafted with appropriate safeguards of the constitutional rights of all affected individuals, which would make it a criminal offense for employees or former employees of the CIA willfully to divulge to any unauthorized person classified information pertaining to foreign intelligence or the collection thereof obtained during the course of their employment.

Response

On 23 April 1975 I submitted to the Office of Management and Budget proposed legislation in line with this recommendation. I had submitted similar legislation in January 1974, which was not introduced, and I have vigorously pursued the objectives of this proposal with the Congress, the Department of Justice, and other interested departments and agencies since that time. It has been evident to this Agency for many years that existing criminal law is inadequate and provides virtually no enforceable sanctions against disclosure of intelligence sources and methods to unauthorized persons. This is because to prosecute under existing law requires disclosure in open court of further sensitive information as well as confirmation of the information disclosed by the person being prosecuted. In very recent years, with the Government's inability to prosecute in well known cases of disclosure by former employees, the need for improved criminal legislation has become evident to many outside of the Intelligence Community. The legislation which I have proposed meets, I believe, all of the standards of this recommendation including particularly safeguards for the consititutional rights of all affected individuals. It would permit prosecution only of persons authorized to possess the information disclosed or who possessed it by virtue of an association with the Government. It specifically precludes prosecution of newsmen or other recipients of information disclosed in violation of the law.

Recommendation (22)

The CIA should not undertake physical surveillance (defined as systematic observation) of Agency employees, contractors or related personnel within the United States without first obtaining written approval of the Director of Central Intelligence.

Response

I concur in this recommendation, but note that the requirement for the Director's prior written approval would apply to some activities by the Agency which the Commission did not find objectionable. These include surveillance of Agency employees in operational situations for their protection or to detect countersurveillance, surveillance of individuals who may be carrying substantial sums of money, or surveillance during the routine investigations mentioned in the response to Recommendation 18. Thus, I believe that the intent of this recommendation can best be met by adoption of detailed internal procedures which define those situations in which DCI approval for surveillance is required and those in which authority can be delegated to the Director of Security or other subordinate levels.

Recommendation (23)

In the United States and its possessions, the CIA should not intercept wire or oral communications[1] or otherwise engage in activities that would require a warrant if conducted by a law enforcement agency. Responsibility for such activities belongs with the FBI.

Response

This recommendation suggests the prohibition within the US and its possessions of two kinds of activity which raise different considerations. The first is the interception of wire or oral communications, and the second is "activities that would require a warrant if conducted by a law enforcement agency." The latter is understood to mean unauthorized entries onto premises and all conduct other than the interception of wire or oral communications which would amount to a search or seizure.

I concur in the recommendation that CIA not engage in "activities that would require a warrant if conducted by a law enforcement agency." Since the Agency has no law enforcement functions, its use within the US of unauthorized entry or other methods which amount to a search or seizure is beyond its legal authority. Cases where the Agency's legitimate interests may call for such activities are infrequent and should be handled by the FBI upon CIA's request (see Recommendation 19).

In regard to the recommendation that CIA be prohibited from intercepting wire or oral communications within the US, I concur that responsibility for such activities belongs with the FBI. I recommend, however, that CIA be authorized to support such FBI activity in cases involving foreign intelligence approved by the Attorney General.

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[1] As defined in the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. Secs. 2510-20.

In regard to possible intercept of communications in the course of equipment testing or the training of operators, see response to Recommendation 28.

Recommendation (24)

The CIA should strictly adhere to established legal procedures governing access to federal income tax information.

Response

I concur in this recommendation. Agency regulations on liaison with the Internal Revenue Service will be revised to clarify the limits and procedures in dealing with the Service and for obtaining income tax information.

Recommendation (27)

In accordance with its present guidelines, the CIA should not again engage in the testing of drugs on unsuspecting persons.

Response

I concur in this recommendation, which reflects directives issued by me on 29 August 1973.

Recommendation (28)

Testing of equipment for monitoring conversations should not involve unsuspecting persons living within the United States.

Response

While I endorse the intent of the Commission in making this recommendation, I believe it is so simple in form as to pose serious difficulties as a guide for actual testing practice. Many types of radio receivers for the collection of foreign intelligence are developed and tested by the CIA, and our personnel are trained in their operation. By their very nature, these receivers are sensitive enough to monitor inadvertently some US conversations in test situations and virtually nothing can be done to prevent this. Adequate acceptance and suitability testing of these systems requires that they be tested in realistic circumstances, and inevitably some conversations will be monitored, though no identification is made of the participants. The building of large scale simulated communications systems for test purposes would be expensive and impractical.

In my view, the guidelines for testing of equipment in the US established by us in August 1973 meet the purposes of the Commission's recommendation and serve as a more realistic guide to such activities. These provide that testing of intelligence equipment may be undertaken in the United States provided that no use of the information collected shall in any way abrogate the rights of US citizens as guaranteed under the Constitution of the United States. If it is essential to test equipment on an American communications system or other establishment, this may be done provided that no recordings of the material are retained or examined by any element other than the original test engineers. In this context the original test engineers constitute the engineers under contract to perform the tests and the Agency technical officers supervising the activity. Knowledge derived from the tests that relates to equipment performance but maintains anonymity of the data source may be exchanged with other elements of the Agency.

Recommendation (29)

A civilian agency committee should be reestablished to oversee the civilian uses of aerial intelligence photography in order to avoid any concerns over the improper domestic use of a CIA-developed system.

Response

I concur in this recommendation and urge that it be accomplished speedily. I should note here that--contrary to the statement in the Commission's Report--a proposed agreement for continuing support in this area of the Environmental Protection Agency was not concluded because of that Agency's law enforcement responsibilities.

The Central Intelligence Agency: Oversight and Accountability

(By the Committee on Civil Rights and the Committee on International Human Rights)

INTRODUCTION

The Central Intelligence Agency, although created expressly for the purpose of gathering and coordinating intelligence, has also been used as a secret instrument of domestic and foreign policy. William E. Colby, Director of the CIA, stated in his January 15, 1975 report to the Senate Appropriations Committee that the domestic activities of the CIA have included the insertion of agents into "American dissident circles" in the late 1960's and early 1970's, and the compilation of dossiers on about 10,000 American citizens. Mr. Colby stated further that a "major" function of the CIA was to undertake, when directed, "covert foreign political or paramilitary operations."

These activities have been facilitated by the extraordinary statutory scheme under which the CIA operates. Its budget is exempt from legislative review, a privilege shared by no other federal agency, and its activities may be any that the National Security Council directs, as long as they concern in some fashion "the national security."

As the debate grows over the historical role of the CIA, more questions have been posed concerning the statutory and constitutional limits of the CIA's authority. The purpose of this report is to respond to these questions. The report will (1) summarize the creation and legal development of the CIA, (2) discuss the CIA's domestic activities and their relation to the laws governing the Agency and to the Constitution, (3) discuss the foreign activities of the CIA and the legislative constitutional basis for these activities, (4) describe the present funding arrangements of the Agency and their legal basis, and (5) discuss possible remedies and make recommendations concerning regulation of the CIA's activities in the future.

I. CREATION AND LEGAL DEVELOPMENT OF THE CENTRAL INTELLIGENCE AGENCY

Pearl Harbor convinced the United States that the need for an intelligence organization was imperative.[1] On June 14, 1942 the Office of Strategic Services (OSS) was created, headed by Col. (later Major-General) William J. Donovan, and throughout the war it gathered intelligence and conducted activities of a paramilitary nature in support of the war effort.[2] In 1944, Donovan prepared a plan for President Roosevelt which would establish a central intelligence agency when the war was ended, but the plan was sidetracked by the Joint Chiefs of Staff,[3] and the OSS was disbanded on September 20, 1945.

On January 22, 1946, President Truman by Executive Order established the National Intelligence Authority (NIA), composed of the Secretaries of State, War and Navy and a personal representative of the President, Admiral William Leahy, for the purpose of planning, developing and coordinating all federal foreign intelligence activities.[5] The operating arm of the NIA was a new organization called the Central Intelligence Group to be staffed with personnel from the Departments of the respective Secretaries.[6] The Group was to be headed by a Director of Central Intelligence who was also a non-voting member of the NIA.

The Central Intelligence Group was the first formal central organization in American history devoted to intelligence matters. Its duties included correlating and evaluating intelligence relating to the national security, disseminating the results thereof to interested government officials and coordinating the activities of the intelligence agencies throughout the government. One of the first tasks it undertook was to furnish the President with a daily report of intelligence information, a function which [illegible] continues to perform.[7]

Less than a year after the establishment of the Central Intelligence Group, the House Committee on Military Affairs issued a report recommending that, instead of permitting the existence of the Group to remain dependent on an Executive Order, the Congress ought to enact enabling legislation giving the Group statutory authority and providing for its funding directly through congressional appropriations.[8] Accordingly, the National Security Act of 1947.[9] In addition to establishing the Department of Defense and unifying the armed services, created the National Security Council (NSC) and, under it, established the Central Intelligence Agency. The duties of the CIA were set forth in five short paragraphs, based very closely on the language contained in the NIA Executive Order. These duties were generally:

1. To advise the NSC in matters concerning such intelligence activities of the government departments and agencies as related to national security;

2. To make recommendations to the NSC for the coordination of such intelligence activities;

3. To correlate and evaluate intelligence relating to the national security, and to provide for the appropriate dissemination of such intelligence within the government, provided that the CIA was to have no police, subpoena, law-enforcement powers or internal security functions;

4. To perform, for thhe benefit of the existing intelligence agencies, such additiona services of common concern as the NSC determined could be more efficiently accomplished centrally; and

5. To perform such other functions and duties related to intelligence affecting the national security as the NSC might from time to time direct. (50 U.S.C. § 403(d)).

By this legislation, the CIA was removed from military control and placed solely under the direction of the NSC. Heading the newly-formed CIA was a Director of Central Intelligence appointed by the President with the advice and consent of the Senate.[10] The authority conferred upon him under the law was extensive. Subject to the recommendations of the NSC and the approval of the President, he was empowered to inspect all intelligence relating to national security gathered by any agency of the government, and all departments were directed to make available to him such intelligence gathered by them "for correlation, evaluation and dissemination." [11] Internally, the Director was empowered, in his personal discretion and notwithstanding any civil service statutes or regulations, to terminate the employment of any agency employee "whenever he shall deem such termination necessary or advisable in the interest of the United States." [12]

In 1949, even more specific powers were conferred upon the Director of the CIA by the passage of the Central Intelligence Agency Act.[13] This Act exempted the CIA from all federal laws which required the disclosure of the "functions, names, official titles, salaries or numbers of personnel employed by the Agency." [14] In addition, the Act gave the Director power to spend money "without regard to the provisions of law and regulations relating to the expenditure of government funds," [15] and granted him the extraordinary right to spend money simply by signing his name, "such expenditures to be accounted for solely on the certificate of the Director without any further accounting therefor." [16] In addition, the 1949 Act allowed the Director, in collaboration with the Attorney General and the Commissioner of Immigration, to admit up to 100 persons into the United States each year, secretly and without regard to immigration quotas.[17]

Neither of the foregoing Acts provided any explicit authority for the CIA to conduct covert operations.[18] All attempts to justify legally such activities, therefore, have had to rely upon the general catch-all provision which makes it the CIA's duty "to perform such other functions and duties relating to intelligence affecting the national security as the NSC may from time to time direct." [19] Apparently relying upon this provision the NSC, in 1948, is said to have authorized the CIA to conduct such special operations, setting forth only two guidelines—first, that the operations be secret and second, that they be "plausably deniable" by the Government.[20] A section was thereupon created by President Truman within the CIA to conduct secret political operations,[20] and Frank G. Wisner, a former OSS man, was brought in from the State Department to head the section with the title of Assistant Director of the Office of Policy Coordination. In addition, the Office of Special Operations was created to conduct secret activities aimed solely at gathering intelligence. The machinery of both offices was in the CIA, but control was shared with the State Department and the Pentagon. On January 4, 1951, the Offices of Policy Coordination and Special Operations were merged into the Directorate of Plans, and thereafter the CIA had sole control over secret operations of all types. Allen Dulles was its first Chief; Frank Wisner was Deputy Chief.[21]

With its newly-formed Directorate of Plans and its involvement in the Korean War, the CIA expanded rapidly. From less than 5,000 employees in 1950, it grew to about 15,000 in 1955 not counting others recruited specially as contract employees and foreign agents. During this period, the Agency is estimated to have spent well over one billion dollars on its various overt and covert activities.[22] Although no information is publicly available, it is estimated that the CIA presently has an authorized manpower of 16,500 and an authorized budget of 750 million dollars,[23] and that approximately two-thirds of its funds and manpower are used for covert operations and supporting services, such as communications, logistics and trade which relate to its covert activities.[24]

II. DOMESTIC ACTIVITIES AND THEIR LEGAL BASIS

A. Domestic Surveillance and Infiltration

In December, 1974, it was reported that the CIA had been engaged in considerable surveillance of American citizens including the opening of mail, tapping of telephones, physical break-ins and the maintenance of files on about 10,000 individuals.[25] William E. Colby, the Director of the CIA, confirmed to the Senate Appropriatons Committee that the domestic activities of the CIA had included:

(1) The recruiting or insertion into "American dissident circles" of at least 22 CIA agents as part of two separate programs by the Agency to monitor such activities in the late 1960s and early 1970s.

(2) The establishment of files by the counterintelligence unit on about 10,000 citizens including members of Congress.

(3) The authorization by Richard Helms of the establishment of a unit inside the Agency's counterintelligence division "to look into the possibility of foreign links to American dissident elements."

(4) The conducting between 1953 and 1973 of "several programs" to survey surreptitiously and open the private mail of American citizens who had correspondents in certain communists countries.[26]

As a result of these and similar revelations the domestic activities of the CIA are currently being investigated by a 7-man Commission appointed by President Ford and several congressional committees.

Footnotes at end of article.

In addition to the CIA's domestic surveillance of dissident political organizations, it is also alleged to have participated in other kinds of domestic operations. These include the funding of special university programs, such as MIT's Center For International Studies, which was reported to have received $300,000 in 1950 and additional financing until 1966.[28] In 1967, following a series of disclosures, the CIA and other government agencies adopted a statement of principles providing that "the fact of government research support should always be acknowledged by sponsor, university and researcher."[29]

The CIA was also alleged to have infiltrated the National Student Association and other youth groups.[30] From 1952 to 1966, the CIA funnelled approximately $3.3 million to the National Student Association, providing in some years up to 80% of its budget.[31] Some of the money was used for scholarships for students from South Africa, Mozambique and Angola. None but the top officials of the Association knew of the CIA connection, much less of the fact that CIA agents were posing as students and influencing the policies of the organization by arguing on issues involving socialism. At the same time some students were recruited by the CIA to act as spies abroad, making dossiers on foreign student leaders.

The consequences growing out of the CIA's relationship with the National Student Association were succinctly analyzed by Professor Jerrold L. Walden:

"In the first place, the relationship constituted outright deception of the membership-at-large, which knew nothing about the CIA's affiliation with the NSA, and thereby violated their constitutional right to freedom of association. As one officer of the NSA observed after evidence of the longstanding relationship had come to light, 'Ninety percent of them wouldn't have anything to do with the organization if they'd known about the CIA business before they joined.' Furthermore, the fact that the CIA financed and influenced the policies of the NSA abroad all but makes meaningless the concept of a free and independent student organization in international affairs."[32]

In 1967, after many of the CIA's domestic activities had been disclosed, President Johnson appointed a committee to examine the CIA's relationships with private organizations. The committee recommended unanimously, and the President adopted as national policy, that: "No federal agency shall provide any covert financial assistance or support, direct or indirect, to any of the nation's educational or private voluntary organizations."[33] However, CIA support to many domestic organizations apparently continued until new ways to finance them could be developed.[34] In some cases, such groups were supported for many years by CIA "severance payments."[35]

The Agency's covert activities in respect to private organizations and the surveillance of domestic political groups acknowledged in Mr. Colby's January, 1975 testimony raise serious questions as to the statutory boundaries of the CIA's authority to operate within the United States. The subsequent section will analyze these boundaries, as well as the CIA's own conception of them as set out in the statements of the Director of Central Intelligence.

B. Statutory Limitations Upon CIA Activities in the United States

The only express statutory limitations upon the activities of the CIA are those found in Section 102(d)(3) of the National Security Act of 1947 (50 U.S.C. 403[d][3]) which provides that it shall be the duty of the Agency

"(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions . . . . *And provided further*, That the Director of the Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;"

The language of the first *proviso* was derived from President Truman's Executive Order of January 22, 1946, establishing the Central Intelligence Group, the CIA's predecessor, which stated:

"4. No police, law enforcement, or internal security functions shall be exercised under this directive."

It was further provided:

"9. Nothing herein shall be construed to authorize the making of investigations inside the continental limits of the United States and its possessions, except as provided by law and Presidential directives."

The National Security Act of 1947 as originally proposed in Senate Bill 758 and House Resolution 2319 (80th Congress, 1st Session) did not expressly state either the powers and duties of the CIA or any limitations thereon. Instead, those bills in effect provided that the CIA would assume the responsibilities of the Central Intelligence Group as set forth in President Truman's Directive. As finally passed, however, the statute expressly adopted, generally verbatim, the powers and duties of the Agency and limitations thereon contained in the Order.[36]

That part of the *proviso* which states that the CIA shall have "no police, subpoena, [or] law-enforcement powers" is clear, and no serious difference of opinion as to what is meant by that phrase appears to have arisen. The term "internal security *functions*," however, has no well established meaning and is nowhere defined in the Act. Nonetheless, there was no doubt in the minds of the supporters of the National Security Act of 1947 that the Agency's primary concern is with foreign intelligence and that its activities in this country were to be strictly limited to those directly related to the correlation and evaluation of such intelligence.[37]

President Truman's Order dealt expressly with "Federal foreign intelligence activities," and it was clear to General Vandenberg, the Director of the Central Intelligence Group, that the CIA in assuming the responsibilities of the Central Intelligence Group would similarly be involved only in foreign intelligence.

Thus, he testified in Senate hearings that:

"The role of the Central Intelligence Group is to coordinate this collection of foreign intelligence information and avoid wasteful duplication . . ."[38]

"One final thought in connection with the President's directive: It includes an express provision that no police, law enforcement, or internal security functions shall be exercised. These provisions are important, for they draw the lines very sharply between the CIG and the FBI. In addition, the prohibition against police powers or internal security functions will assure that the Central Intelligence Group can never become a Gestapo or security police."[39]

The House also held hearings with regard to the proposed National Security Act of 1947. Dr. Vannevar Bush, a witness in support of the Act, when asked whether there was any danger that the CIA might become a Gestapo, replied:

"I think there is no danger of that. The bill provides clearly that it is concerned with intelligence outside of this country, that it is not concerned with intelligence on internal affairs. . . .

"We already have, of course, the FBI in this country, concerned with internal matters, and the collection of intelligence in connection with law enforcement internally."[40]

Secretary of War Forrestal, also testifying in favor of the Act, similarly said:

"The purposes of the Central Intelligence Authority [sic] are limited definitely to purposes outside of this country, except the collation of information gathered by other Government agencies.

"Regarding domestic operations, the Federal Bureau of Investigation is working at all times in collaboration with General Vandenberg. He relies upon them for domestic activities."[41]

Official recognition of these limitations has also been expressed by top CIA officials. Testifying before the Senate Armed Services Committee in January, 1975, former Director Richard Helms stated:

"It so happens that the word 'foreign' does not appear in the act. Yet there never has been any question about the intent of the Congress to confine the agency's intelligence function to foreign matters. All the directors from the start—and Mr. Colby is the eighth in the succession—have operated on the clear understanding that the agency's reason for being was to collect intelligence abroad."[42]

William E. Colby, the present CIA Director, reported that he approved a proposed amendment to the National Security Act of 1970 to

". . . add the word 'foreign' before the word 'intelligence' wherever it appears in the act, to make crystal clear that the agency's purpose and authority lie in the field of foreign intelligence."[43]

There is general agreement, therefore, that the CIA's primary concern is "foreign intelligence" and that it is to have no "internal security functions." What is not clear is the exact meaning of those terms and the extent to which the CIA is or should be authorized to operate domestically.

We have found no source which defines the term "internal security functions" as used in the National Security Act or even attempts a definition, and there is nothing in the legislative history of the Act which provides any certainty as to exactly what Congress intended to prohibit.

Some limited assistance can be derived from judicial usage of the term in related areas. In *United States v. United States District Court*, 407 U.S. 297 (1971) (the so called "Keith" case), the Supreme Court held that the Fourth Amendment prohibits warrantless electronic surveillance in cases involving "domestic security," a term which the Court used interchangeably with "internal security." The Court spoke of the difficulty of defining "the domestic security interest" and the "inherent vagueness of the domestic security concept" and never provided a complete definition. It did, however, indicate that insofar as the question relates to electronic surveillance, "domestic security" was not involved where the activities were those of a foreign power or its agents, whether within or without the country, and, as a corollary, that "domestic security" was involved where the activities were those of American citizens who had a significant connection with a foreign power or its agents or agencies.

The Keith case notwithstanding, however, Messrs. Helms and Colby appear to have adopted a different definition of the term "internal security" based solely on whether or not the intelligence activities are conducted in this country. Thus according to Mr. Helms:

". . . The FBI handles the counterintelligence function inside our shores. The CIA does the job abroad . . . ."[44]

and as stated by Mr. Colby:

"Counterintelligence activities in the country, for our internal security, are the responsibility of the FBI.

"However, the National Security Council has directed the CIA to conduct 'clandest

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counterintelligence outside the United States . . ." [15]

The limitations on the CIA's authority to act domestically have been confused by its power to protect "intelligence sources and methods from unauthorized disclosure" [§ 403(d)(3)]. The extent to which this is used to justify domestic operations is reflected in the one federal court opinion involving domestic CIA activities. In *Heine* v. *Raus*, 261 F. Supp. 570 (D. Md. 1966), vacated and remanded 399 F. 2d 785 (4th Cir. 1968), an employee of the CIA asserted a defense of absolute privilege against a charge of slander, on the ground that he had been instructed by his CIA superior to warn the members of an Estonian emigre group in the United States that plaintiff was a Soviet agent and that when he did so he was acting within the scope of his employment and authority.

Plaintiff contended that the statements made by defendant were actions beyond the statutory power of the CIA because 50 U.S.C. 403(d)(3) provides that the Agency shall have no internal security functions. Plaintiff argued that agencies such as the FBI "must deal with security matters arising within the borders of the United States." The court noted, however, that one of the functions entrusted to the CIA was the protection of intelligence sources and methods, and cited the affidavit filed by Richard Helms stating that the defendant had been instructed to inform the emigre group about the plaintiff "to protect the integrity of the Agency's foreign intelligence sources." The court concluded (p. 576):

"It is reasonable that emigre groups from nations behind the Iron Curtain would be a valuable source of intelligence information as to what goes on in their old homeland. The fact that the immediate intelligence source is located in the United States does not make it an "internal-security function," over which the CIA has no authority. The Court concludes that activities by the CIA to protect its foreign intelligence sources located in the United States are within the power granted by Congress to the CIA."

In attempting to define the appropriate limits of CIA domestic activity, it is instructive to review the perimeters established by the CIA itself. For that purpose, we set forth below an analysis of the public statements of Messrs. Colby and Helms regarding permissible activities of the CIA.

Domestic activities viewed as permissible by the CIA

1. Recruiting, screening, training and investigating employees.[16]

2. Investigating Americans with whom the CIA "anticipates some relationship—employment, contractual, informational or operational." These include actual or potential contacts of the Agency, consultants and independent contractors, and individuals employed by contractors.[17]

3. Identifying "individuals who might be of assistance to agency intelligence operations abroad." [18]

4. "Interviewing American citizens who knowingly and willingly share their information about foreign subjects with their government." [19]

5. "Contracting for supplies essential to foreign intelligence operations." [20]

6. Contracting with U.S. industrial firms or research institutes for research and development of technical intelligence devices and enlisting the capabilities of the American scientific, technical and other research communities to assist in research and analysis. This includes, in some cases, the establishment of separate organizations "under a cover story of commercial justification." [21]

7. Collecting foreign intelligence from foreigners in the United States; developing relationships with foreigners in the United States who might be of assistance to the collection of intelligence abroad.[22]

8. Resettling foreign defectors who take up residence in the United States.[23]

9. Establishing support structures in the United States to permit CIA operations abroad.[24]

10. Providing training to foreigners in the United States.[25]

11. Carrying on ostensibly private commercial and funding activities to support CIA operations, and in that connection negotiating with cooperating United States business firms and others on private cover arrangements.[26]

12. Carrying on investigations within the Government of unauthorized disclosures of classified intelligence.[27]

13. Protecting intelligence sources and methods within the Agency.[28]

14. Disseminating to responsible United States agencies information on the foreign aspects of the anti-war, youth and similar movements, and their possible links to American counterparts; also supplying information to a Government committee on the foreign aspects of civil disorders.[29]

15. Passing on to the FBI "information on foreign connections with Americans"; advising the FBI of "possible foreign links with domestic organizations"; providing at the request of the FBI coverage of foreign travel of FBI suspects.[30]

16. Contributing to a "joint effort" to cover domestic unrest by increasing its coverage of American students and others involved with foreign subversive elements while travelling or living abroad.[31]

17. Passing the results of foreign intelligence operations to appropriate U.S. agencies having a legitimate interest therein, e.g. advising the FBI of the imminent arrival in the U.S. of a foreign terrorist, advising the Drug Enforcement Administration regarding details of the drug traffic and appropriate authorities regarding the evasion of U.S. export controls, etc.[32]

18. Supplying equipment and "safe houses" to other government officials if to be used for a legitimate purpose.[33]

Domestic Activities Viewed as Prohibited by the CIA

1. Identifying and countering foreigners working within the United States against our internal security (this, Mr. Colby says, is a function of the FBI).[34]

2. Helping to make policy regarding the collection of intelligence on domestic groups.

3. Collecting, or providing the support necessary for collecting, intelligence within the United States on domestic groups.[35]

4. Collecting intelligence on U.S. citizens abroad who do not appear to be involved with the activities of foreign governments or foreign institutions.[36]

DOMESTIC ACTIVITIES OF THE CIA IN "GRAY AREA"

1. Preparing a psychological profile on a U.S. citizen such as Daniel Elsberg.[37]

2. Providing covert assistance to American educational or voluntary organizations.[38]

3. Inserting agents "into American dissident circles in order to establish their credentials for operations abroad." [39]

4. Inserting agents into American dissident organizations to gather information relating to plans for demonstrations, pickets, protests or break-ins that might endanger CIA personnel, facilities and information.[40]

5. Training local police personnel.[41]

6. Making a vulnerability study of a foreign embassy in Washington.[42]

7. Surreptitious entry into homes of employees and former employees; physical surveillance and wiretapping of some persons who were not employees or former employees; opening the mail of attorney Bella Abzug and other persons, and maintaining counter-intelligence files on her activities and those of three other members of Congress.[43]

What conclusions can be drawn from the foregoing listings and the statements of Messrs. Helms and Colby?

1. To the Agency, the term "foreign intelligence" means "information associated with foreign happenings" [44] or "intelligence pertaining to foreign areas and developments." [45] Nonetheless, although in Mr. Helms' words, "the agency's reason for being . . . [is] to collect intelligence abroad," [46] it is evident from the activities listed above that much of its work is done in this country and that the support structure in the United States which the Agency believes is necessary to carry out its intelligence function now permeates our national life and society to a very substantial extent. It is also apparent that the operation of such a structure and the "need" to protect it have resulted in, and served as a justification for, the Agency's intrusion into domestic areas only distantly related to the field of foreign intelligence.

2. It is evident from the foregoing tabulation of permissible and prohibited powers, as well as other statements of Messrs. Helms and Colby, that they have had no consistent and common understanding of the activities prohibited to the Agency by statute.

How is it that the Agency has become involved in "internal security" matters; despite its public position that subversive activities carried on within the United States, whether by a foreign power or an American citizen, are not within its jurisdiction?

One answer is that even though the Agency appears to have developed its own working definitions of "internal security functions," the lack of a statutory definition permits the Agency to adjust its meaning or to carve out exceptions to it to fit the circumstances. As experience has shown, this is particularly likely to occur when the Agency is under pressure from others in the Executive Branch to provide information or assistance or when the Agency believes one of its activities requires "protection."

Another answer in many cases seems to be that in the Agency's view, the responsibility put upon the Director by the National Security Act to protect "intelligence" sources and methods from unauthorized disclosure constitutes authority to protect not only CIA files and sources, but all government documents and sources. There is no legislative history regarding Congress' intention in giving the Director this responsibility. Even Mr. Helms and Mr. Colby appear not to agree as to the interpretation of the provision.[47] However interpreted, the provision has been used to justify CIA domestic activity which in our view involves the exercise by the CIA of internal security functions, and thus to nullify the statutory prohibition against such activity.[48]

III. FOREIGN INVOLVEMENTS AND THEIR LEGAL AND CONSTITUTIONAL BASIS

A. Foreign activities

That the Central Intelligence Agency conducts disruptive political operations abroad that are not directly related to the gathering of information is not disputed. CIA Director William E. Colby, in his January 15, 1975 report to the Senate Appropriations Committee, described the third of the CIA's "three major functions" as being

"To conduct clandestine operations to collect foreign intelligence, carry out counter-intelligence responsibilities abroad, and *undertake—when directed—covert foreign political or paramilitary operations*." (Emphasis added) [49]

One such parliamentary operation was the armed invasion of Cuba at the Bay of Pigs by a small army organized, paid and equipped by the CIA in April, 1961.[50] Another was the war in Laos, where from 1963 to 1973 the CIA with financial assistance from AID and the Defense Department, paid, equipped and directed an armed force of irregulars to fight the Pathet Lao and North Vietnamese Com-

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munists in Laos.[51] In fiscal 1973 the United States spent $353 million on military activities in Laos.[52] In discussing these involvements Mr. Colby has emphasized that they were directed by the National Security Council [53] and that the appropriate congressional committees were informed of the war in Laos.[54] However Senator Symington, Chairman of the Senate Armed Services Committee, has stated that he was not informed until long after the fact.[55] And Senator Ellender, then a member of the Senate Appropriations Intelligence Subcommittee charged with CIA oversight, stated in 1971 that he had not been informed of CIA plans to spend money on an army of 36,000 in Laos.[56]

The CIA has also acknowledged its covert political operations in Chile. In September, 1974 Representative Harrington made public the substance of testimony by Mr. Colby to the Intelligence Subcommittee of the House Armed Services Committee regarding political activities in Chile by the CIA from 1970 to 1973.[57] According to this account, the Nixon Administration authorized a total of $8 million for expenditure on such activities as campaigns of anti-Allende candidates, subsidy of an anti-Allende newspaper, purchase of a radio station and other projects, although a lesser amount was actually disbursed.[58] President Ford subsequently stated that the covert funds had been spent in Chile to "preserve opposition political parties," but said that he would take no position on whether such CIA activities were permitted by international law.[59]

B. Statutory framework for CIA covert political operations

Serious questions have been raised regarding the legal justification for and the political wisdom of the CIA's foreign political operations. Since this report is concerned solely with the constitutional and statutory issues affecting the CIA, it will not focus on any of the political issues but rather will be limited to a review of the legal authority upon which the CIA's foreign covert operations are said to be based.

Prior to the passage of the Foreign Assistance Act of 1974 which was signed into law on December 31, foreign covert operations not directly linked to the gathering of intelligence were justified under the fifth and last of the duties established for the CIA under the National Security Act of 1947. Pursuant to that provision it was the CIA's duty "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." [60] Richard Helms, while Director of the CIA, took this approach in a speech delivered on April 14, 1971 in which he said that the language of this provision "was designed to enable us to conduct such foreign activities as the national government may find it convenient to assign to a 'secret service'." [61]

Director Colby also implied as much in his nomination hearings when he referred to that provision as "the authority under which a lot of the Agency's activities are conducted." [62]

Upon careful analysis of the provision's language, however, the interpretation forwarded by Messrs. Helms and Colby does not appear to be warranted. Not only must the "other functions and duties" be "related to intelligence," they must also be performed only upon the direction of the National Security Council. The authority of the National Security Council is therefore the key issue and the limitations upon the NSC's authority are clear. The NSC is not an action agency. Its primary function is—

"To *advise* the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security." (Emphasis added) [63]

The NSC was also given certain "additional functions," none of which gave it any more operational responsibility than its primary function. These additional functions were—

(a) to perform "such other functions as the President may direct, for the purpose of more effectively *coordinating* the policies and functions of the departments and agencies of the Government relating to the national security . . .";[64]

(b) "*to assess and appraise* the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith": [65]

(c) "to *consider* policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and to make *recommendations* to the President in connection therewith;" [66] and

(d) "to make such *recommendations, and such other reports* to the President as it deems appropriate or as the President may require." [67] (Emphasis added)

The powers given to the National Security Council by Congress, therefore, were either of an advisory nature or were related to the coordination of policies and functions of the other agencies in the national security area. Nowhere is the NSC directly given the power to conduct political operations. It is therefore difficult to maintain that the CIA can define its covert activities as a delegation of power from the National Security Council, since the NSC has no such power to delegate.

It is also interesting to note that in the provision of the National Security Act of 1947 headed "Protection of Nature of Agency's Functions," which section exempts the CIA from the provisions of any law requiring the publication or disclosure of organizational information, justification for the exemption is based solely upon "the interests of the security of the foreign intelligence activities of the United States" and the protection of "intelligence sources and methods from unauthorized disclosure." [68] This means either that nonintelligence covert activities were not contemplated by Congress or that such activities were not intended to be exempted from the disclosure laws,[69] an interpretation which is unlikely since it would render any such activities ineffective.

On a more general level, the CIA's covert activities not directly related to the gathering of intelligence are in some instances inconsistent with its basic purpose, that of gathering sufficiently detailed and accurate information to enable our Government to formulate foreign policy. To the extent that the CIA's activities conflict with rather than assist in the formulation of foreign policy, congressional purpose would appear to have been thwarted.

Prof. Jerrold L. Walden has concluded as the result of a detailed analysis of the congressional debates establishing the CIA that "at no place in the legislative history of the C.I.A. is it apparent that Congress intended the Agency to engage in subliminal warfare. The C.I.A. was touted as being exclusively an intelligence coordinating body, and it was created as such." [70] Walden points out that what few recommendations there were that such activities be allowed were not adopted.[71] Other participants favorable to such operations explicitly acknowledged their exclusion from the coverage of the [illegible] Senator Wherry (R. Nebr.) and Senator Ferguson (R. Conn.) stated in the debate leading to enactment of the 1947 law that while he clearly wanted "an independent intelligence agency working without direction by our armed services, with full authority in operation procedures," he recognized that it was "impossible to incorporate such broad authority in the bill now before us . . ." [72]

That the CIA was intended for intelligence gathering purposes only is also reflected in the relevant House and Senate committee reports. According to one House report the CIA was created in order that the National Security Council "in its deliberations and advice to the President, may have available adequate information," the CIA to "furnish such information." [73] The Senate Armed Services Committee's report set out in its statement of basic objectives that ". . . we must make certain . . . that a central intelligence agency collects and analyzes that mass of information without which the Government cannot either maintain peace or wage war successfully . . ." [74] Nowhere in any report is any reference made to activities other than those of an intelligence-gathering nature.

Ironically, the only clear congressional authorization for the CIA to conduct covert activities resulted from an attempt to limit those activities. This authorization is contained in Section 663 of the recently enacted Foreign Assistance Act of 1974 which amends the Foreign Assistance Act of 1961 to add the following new section:

"SEC. 663. Limitation on Intelligence Activities.—(a) No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, *unless and until* the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives. (emphasis added)

"(b) The provisions of subsection (a) of this section shall not apply during military operations initiated by the United States under a declaration of war approved by the President under the War Powers Resolution." [75]

Under this provision no covert activity is permitted until (a) the President makes a finding that such an operation is important to the national security of the United States, *and* (b) the President reports "in a timely fashion" to the appropriate congressional committee. While this provision makes it clear that such a Presidential finding and report is a prerequisite to any CIA covert operation, it provides no guidance as to what the report should contain.

As will be shown in greater detail in a subsequent section, both Congress and the Executive have constitutionally-based responsibilities in the establishment of foreign policy. Congressional supervision of CIA foreign political activities is possible only if Congress is sufficiently informed; the report required under the Foreign Assistant Act of 1974 could provide the necessary information.

To assure the usefulness of the report, however, further guideline should be established by Congress, such as a set of basic questions to be answered by each such report. At a minimum, Congress should require legislatively that each such report be accompanied by a proposed budget to be followed up, as promptly as possible, by a statement of the funds actually expended for the operation. The proposed budget would give [illegible] of the scope of the program intended, enabling them to focus more clearly on the plan, and the follow-up budget would serve as a check on the ac-

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curacy of the initial report. Such a requirement would be a logical [illegible] 663, the basic concern of which is the expenditure of funds by the CIA.

B. Imposition of substantive standards in foreign political activities

Professor Stanley Futterman suggests that if the CIA is to be allowed to continue to conduct political activities abroad, some standards should be established to place limits on these activities. Futterman, *Toward Legislative Control of the CIA*, 4 Int'l Law & Pol. 431, 446 (1971). For example, Professor Futterman urges that the CIA "should never torture holders of information, or, at least short of a war situation, engage in political assassination." Others, including Rep. Michael Harrington, have suggested that the CIA should be limited to gathering intelligence, purportedly the intention of Congress in 1947 in establishing the Agency, and prohibited from conducting any clandestine political activities.[108]

Establishment of standards is related to the basic question of what role the United States should play in international affairs—i.e., should a nation engage in espionage and undeclared wars—and of what role Congress should play vis-a-vis the President in directing the foreign affairs of our country.

These issues can be raised but not answered within the scope of this report. However, they are appropriate, and indeed vital, for congressional consideration.

C. International law

In order to assess whether or not the activities of the CIA have violated international law, one must recognize that international law itself is a continually evolving area. As one commentator has explained, "the emphasis nations currently place on political and ideological warfare has, as a matter of necessity, resulted in the creation of new forms of 'indirect' or 'subversive' intelligence that are not amenable to traditional criteria and definitions [of international law]." Comment, *The Dominican Crisis*, 4 Duquesne Univ. L.R. 547, 556 (1965–6).

It has been urged that direct military intervention, such as the Bay of Pigs incident in 1961, is clearly an interference in the internal affairs of another state. Friedman, *United States Policy and the Crisis of International Law*, 59 A.J.I.L. 857, 865 (1965). It has also been argued that international law precludes the more indirect CIA operations, such as the alleged funding and other assistance provided various political groups in Latin America,[107] Professor Quincy Wright suggests that as a basic proposition of international law, every state has the right to enact within its territory any legislation whatever (except an abridgment of diplomatic immunities), and that such legislation must be respected by other states in time of peace. He therefore concludes that all espionage activities authorized by a government which violate the internal law of the target country (which would presumably include bribery, riots, and disruptive activity, along with murder, theft and other violent actions) are in violation of international law. *The Pueblo Seizure, Facts, Law, Policy*, 63 Proc. Am. Soc. Int. L.2, at 8–9 (1969). The Universal Declaration of Human Rights and the Covenants also contain standards which guarantee to the citizens of all states the fundamental right of self-determination and the right to govern their own affairs.

On the other hand, it has been asserted that since the communist countries take the position that wars of "national liberation" are valid under international law, see Reisman, *Private Armies in a Global War System: Prologue to decision* 14 Va.J. Int. Law 1 at 4–5 (1973), the actions taken by the West to anticipate, counteract and otherwise prevent such communist activities prior to the full outbreak of war are lawful either as [illegible] otherwise.[109] As State Department Legal Advisor Leonard Meeker stated with regard to United States intervention in the Dominican Republic:

". . . [R]eliance on absolutes for judging and evaluating the events of our time is artificial, . . . black and white alone are inadequate to portray the actuality of a particular situation in world politics, and . . . fundamentalist views on the nature of international legal obligations are not very useful as a means to achieving practical and just solutions to difficult political, economic, and social problems. . . . It does not seem to me that law and other human institutions should be treated as abstract imperatives which must be followed for the sake of obeisance to some supernatural power or for the sake of some supposed symmetry that is enjoined upon the human race by external forces. Rather, it seems to me that law and other institutions of society should be seen at deliberate and hopefully rational efforts to order the lives of human communities—from small to great—in such a way as to permit realization by all members of a community of the full range of whatever creative powers they may possess. . . . We recognize that, regardless of any fundamentalist view of international law, the situation then existing required us to take action to remove the threat and at the same time to avoid nuclear war. In the tradition of the common law we did not pursue some particular legal analysis or code, but instead sought a practical and satisfactory solution to a pressing problem." [110]

Greater guidance can be found in the treaties into which the United States has entered and to which it is bound. Because of the large number of treaties to which the United States is a party, we have limited our review to the countries of Latin America. Despite the small size of this sampling, several interesting points emerge.

In the additional Protocol Relative to Non-Intervention, signed in 1936 by Argentina, Paraguay, Honduras, Costa Rica, Venezuela, Peru, El Salvador, Mexico, Brazil, Uruguay, Guatemala, Nicaragua, Dominican Republic, Colombia, Panama, Chile, Ecuador, Bolivia, Haiti, Cuba and the U.S.A.,[111] the parties "declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties" (Article 1). Similarly, the "Convention on Rights and Duties of States," proclaimed Jan. 18, 1935,[112] provides in Article 8: "No state has the right to intervene in the internal or external affairs of another." [113] Article 11 asserts:

". . . The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily."

In the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), proclaimed in December, 1948,[113] the parties "undertake to submit every controversy which may arise between them to methods of peaceful settlement." (Article 2). In Article 6, the treaty sets forth that if "the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is *not* an armed attack . . . the Organ of Consultation shall meet immediately in order to agree on measures which must be taken to assist the victim of aggression" (emphasis added).

Finaly, in the Charter of the Organization of American States,[115] the signatories affirm that "International order consists essentially of respect for the personality, sovereignty and independence of States . . ." (Article 5[b]), that "Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law" (Article 16), that "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." (Article 16).

Thus, although some questions may exist under the principles of international law, the obligations of the United States under its treaties are clear. To the extent that the activities of the CIA violate these treaties, the Executive is abrogating policy established through the advice and consent of the Senate as the foreign policy of the United States and international obligations of our Government.

D. Constitutional issues regarding foreign covert political activities

The Constitution draws no clear boundaries between the foreign affairs responsibilities of Congress on the one hand and those of the President on the other. No cut-off point exists where the powers of one end and those of the other begin. Certain limited powers are assigned to both but an enumeration of those powers provides little help in defining the relative jurisdictions of the two branches of Government. What remains is a broad area in which either branch is able to operate subject only to its own limitations and to any counter-efforts which might be undertaken by the other. Differences in this area are resolved not by the courts but through intra-governmental conflict, each branch making such use as it is able of its unique powers and its ability to gather support in the political arena.

As far as Congress is concerned, it was expressly vested by the Constitution with the general "power to provide for the common Defence . . . of the United States," [116] supported by the more specific powers to "declare War," [117] "raise and support Armies . . . ," [117] "provide and maintain a Navy," [118] "make rules for the Government and Regulation of the land and naval Forces," [119] and "provide for calling forth the Militia." [120]

By giving Congress the power to declare war, the framers of the Constitution were attempting to make certain that no such action would be taken without broad and meaningful public debate. James Wilson, one of the most active participants in the drafting and passage of the Constitution, expressed this attitude when he told the Convention that the power to "declare" war was lodged in Congress as a guard against being "hurried" into war, so that no "single man [can] . . . involve us in such distress." [121] Congress' power to declare war is limited only by the power of the President to repel sudden attacks without congressional authorization.[122] Such an exception, which recognizes that Congress as a deliberative body might not be able to respond sufficiently quickly to an attack, was the express intent of James Madison and Elbridge Gerry during the drafting of the Constitution when they moved to replace the phrase "make war" with the ultimately adopted "declare war." [123]

Whatever might have been the intentions of the framers, however, it is clearly unrealistic to believe that the power to declare war, taken literally, automatically gives Congress control over the country's military involvement. Only the Executive Branch is structured to deal with the complexities of foreign affairs on a daily basis, and whether the President's power to do so is founded solely in the powers enumerated in the Constitution or derives in bulk through his duty to "take Care that the Laws be faithfully executed," [124] his power in conducting foreign affairs cannot be seriously questioned.[125] While this power relates basically to the execution of our foreign policy, however, left unchecked by a benign Congress it becomes the force which dictates what our foreign policy is to be.

The President's role in foreign affairs has

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explicit limits. The ultimate policy decision to engage in war can be made only by Congress; a formal declaration is not required, any action from which congressional consent or ratification might be clearly inferred being constitutionally sufficient.[125] Armed forces and the militia can be raised and supported only by Congress. Treaties can be entered into only with the concurrence of two-thirds of the Senators present.[127]

Many aspects of the CIA's covert political activities abroad remain unclear or unverified. However, certain CIA operations which have been acknowledged by the Agency appear to be patently unconstitutional. The Bay of Pigs invasion, for example, was a usurpation by the Executive of Congress' power to raise and support Armies . . ." [128] and to "declare War." [129] Similarly unconstitutional was the recruiting and supporting over a period of years of a large army in Laos without congressional knowledge.[130] Both the Cuban and Laotian operations might have been justifiable had they involved the need to act promptly to repel sudden attacks upon the United States. The planning of both operations, however, took sufficently long as to eliminate any reason for not involving Congress.

In still other actions, such as those in Chile,[131] the CIA conducted activities which apparently breached treaties ratified by the Senate. In ratifying these treaties, the Senate was exercising its constitutional power to set the standards which guide the President in the conduct of foreign policy. The CIA's violation of these treaties contravened the standards established by the Senate and undermined its constitutional role.

It is the opinion of some that many of these abuses result from improper internal controls or lack of accountability. It is thought, therefore, that organizational reform could be used to create an effective deterrent to further illegal activities. Among the steps recommended are a limit on the Director's term of office, clearly designated channels of responsibility, an internal "Inspector General" with the right to take administrative action against individuals, and the mandatory rotation of senior officials. We believe that these and similar reforms should be given serious consideration.

By failing to provide proper review of CIA operations, Congress has relinquished to the CIA its own constitutionally-based responsibility in the formulation of our foreign policy.

Under such circumstances, a President acting entirely within his constitutional prerogatives could lead the country to a point where Congress could do nothing but support the *status quo*, thus effectively "declaring" war. To the extent that Congress by its inaction allows such a situation to arise, it is violating its constitutional trust as seriously as if it were affirmatively passing legislation unconstitutional on its face.

Congress has not necessarily met its constitutional obligations with the passage of the CIA amendment to the Foreign Assistance Act of 1974. If this provision serves merely to perpetuate the past practice of providing limited information to a few sympathetic senior committee members,[132] the new law will provide no effective means for congressional assertion of its constitutional role. Only by subjecting the CIA to a continual and meaningful review process and by promptly challenging any activities which are contrary to its own general foreign policy objectives will Congress be realizing this duty.

Mr. Colby has referred to the Agency's need to protect "intelligence secrets" as in "obvious potential conflict . . . with the right of citizens in a democracy to know what their Government is doing in their name (and with their money)." [133] It should be recognized that Congress has in the past worked out a variety of procedures for safeguarding information while continuing to exercise oversight of Executive actions. Former Attorney General Elliot Richardson has testified that classified and other sensitive information is "constantly" made available to congressional committees in executive session or otherwise under terms and conditions limiting or prohibiting disclosure to the public.[134] However, if the ultimate choice in balancing these interests were between the constitutional requirement of effective control of American foreign policy by our elected representatives on the one hand and the clandestine foreign political activities of a small number of unaccountable bureaucrats on the other, we would opt for congressional control.

IV. BUDGETARY PROCEDURE AND ITS STATUTORY BASIS

A. Funding arrangements: The present process of appropriation

The question persists why Congress has not acted sooner to prevent the CIA from carrying out foreign policy abuses. Part of the answer lies in the fact that by enacting and implementing unique budgetary procedures which allow the Congress to vote on the CIA budget without knowing its contents, the Congress has abandoned its most effective method of controlling the activities of the CIA. An understanding of these procedures is essential to any evaluation of Congress' present role in overseeing the Agency.

The CIA budget process begins like that of any other executive agency, with a budget request to the Office of Management and Budget (OMB).[135] This request is supposedly reviewed by the Intelligence Resources Advisory Committee (IRAC) chaired by the Director of Central Intelligence (DCI) and consisting of representatives from the Departments of State, Defense and the OMB, and coordinated with the intelligence requests of other agencies before it is formally submitted to the OMB, but such review is reportedly sketchy.[136] The OMB then conducts a detailed review of the CIA budget request, consisting of a written justification for the request, written responses to detailed questions posed by OMB staff and oral hearings.[137] During the review process, the CIA budget is coordinated with those of the other foreign intelligence agencies and the total intelligence budget is then forwarded to the President for submission to Congress.

However, the Congress never sees the actual CIA budget, nor do the Appropriations Committees of the House and Senate. Rather, the budget is reviewed and approved only by the Intelligence Subcommittee of the Appropriations Committee of each house.[138] Until the present Congress, the Intelligence Subcommittees have been composed of the chairmen of the full Appropriation Committees, the ranking minority member of the full committees and senior members of the Appropriations Subcommittees on Defense.[139] They are said to conduct extensive budget hearings attended by staff members of the Intelligence Subcommittees and representatives of the CIA.[140] In the House, a complete stenographic record is made of these proceedings, which is then stored at the CIA and delivered to the Capitol on request; in the Senate, no record of CIA budget hearings is made.[141] Once the Subcommittee decides what the CIA budget will be, it then divides up and disguises it in various appropriation of the Defense Department and other agencies.

Congress then votes on appropriations inflated by sums destined for the CIA without knowing either that they are doing so or the dollar amount earmarker for the CIA. Even if a Congressman suspects that an appropriation contains CIA funds, he has no means of discovering how much CIA money is enfolded. Once the bills are enacted, the Appropriations Committee Staffmen apply [illegible] instructions as to which funds [illegible] to be transferred to the CIA, and the OMB carries out these instructions.[142]

B. Statutory basis and constitutionality of appropriations process

The legal authority for these extraordinary procedures is found in the Central Intelligence Agency Act of 1949.[143] Section 6 of the Act provides:

"In the performance of its functions, the Central Intelligence Agency is authorized to:

(a) Transfer to and receive from other Government agencies such sums as may be approved by the Bureau of the Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of this Act without regard to limitations of appropriations from which transferred." [144]

Section 10(a) provides:

Notwithstanding any other provisions of law, sums made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out its functions . . .[145]

The language in these sections allowing transfers of money to the CIA "without regard to any provisions of law limiting or prohibiting transfers between appropriations" and providing for expenditure of "sums made available to the Agency by appropriation *or otherwise*" (emphasis added) and "without regard to limitations of appropriations from which transferred" seems difficult to reconcile with the *constitutional* requirement contained in Article I Sec. 9, Cl. 7 that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." [146] A transfer of money to the CIA despite a prohibition against such transfer and the expenditure of that money in a manner forbidden by the appropriation legislation would not be "in consequence of appropriations made by law," but rather would be in derogation of such appropriations.

It has been convincingly argued that in passing the 1949 Act, Congress did not intend to exempt the CIA from substantive limitations on expenditures enacted by subsequent Congresses, but only to free it from compliance with technical funding limitations. Support for this argument can be found in the fact that Section 6(a) quoted above, is followed by several sections exempting the CIA from other technical limitations, such as prohibitions on the exchange of appropriated funds other than for silver, gold, United States notes and national bank notes, restrictions on using personnel or other government agencies, and limitations on the payment of rent and making of improvements to leased premises.[147] Similarly, Section 10(a) contains a long list of housekeeping purposes for which sums may be expended, including "purchase, maintenance, and cleaning of firearms," "printing and binding," "association and library dues" and "repair, rental, operation and maintenance of buildings, utilities, facilities and appurtenances."

Further support for the view that the 1949 Congress did not intend to exempt the CIA from future substantive limitations on expenditures is found in the legislative history of the 1949 Act. Former CIA Director Rear Admiral Hillenkoeter, in a letter to Senator Millard E. Tydings, assured Congress that:

"In almost all instances, the power and authorities contained in the bill already exist for some other branch of the Government, and the bill merely extends similar authorities to the Central Intelligence Agency." [148]

Footnotes at end of article.

An identical assurance was given to the House of Representatives by the sponsor of the bill, Representative Sasscer.[116]

Thus the authority in the 1949 Act for the CIA to spend money "[n]otwithstanding any other provision of law" does not free the CIA from compliance with later substantive restrictions on spending, such as those contained in the Foreign Assistance Act of 1974. Moreover, the existence of such restrictions, while providing a check on CIA expenditures, does not resolve the conflict between the present practice of concealing the CIA budget from the legislature and the constitutional requirement that money may not be disbursed except "In consequence of appropriations made by law." That requirement would be met only if Congress knowingly voted on the total budget amount.[130]

C. The present accounting procedure

Once the money for the CIA has been appropriated and transferred, there is no way under present arrangements for Congress, much less the public, to know how it has been spent. In order to assure that CIA activities will remain secret, four subcommittees charged with oversight of the CIA meet in executive session and are not required to report to Congress as a whole.[131] No agency within the executive branch has a statutory duty to audit CIA expenditures, and although OMB performs some budgetary oversight, it relies on financial data supplied by the CIA, which it does not check independently.[132] As a result of the hidden appropriations procedure described above, the annual "Combined Statement of Receipts, Expenditures and Balances of the United States Government" (Combined Statement) published by the Secretary of the Treasury pursuant to 31 U.S.C. § 1029 and Article I, Section 9, Clause 7, of the Constitution, contains no mention of monies received and expended by the CIA.[133]

Neither of these provisions expressly exempts the CIA from its coverage, however. The relevant part of Article I, Section 9, Clause 7, the Statements and Accounts Clause, requires that: "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

The legislation implementing this requirement, 31 U.S.C. § 1029, states:

"It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post-Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation." [134]

Read alone, these provisions would seem to require an accounting of CIA receipts and expenditures along with those of all other executive agencies. However, the argument is generally made that the 1949 Act provides an exception to these requirements in the case of the CIA.

D. Statutory basis for the present accounting procedure

The language of the 1949 Act does not seem to free the CIA entirely from any duty to account to Congress or the public. The relevant provision states:

"The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified." [135]

Logic dictates that "the provisions of law and regulations relating to the expenditure of Government funds" referred to in the first half of subsection (b) must be provisions other than those relating strictly to accounting requirements. If accounting requirements were included among such "provisions" then the CIA would be exempted from them by this language, and the second half of the sentence would be rendered either superfluous or meaningless. Although it is addressed solely to the question of accounting, the second half of the sentence does not exempt the CIA from all accounting requirements, but only from accounting for expenditures made "for objects of a confidential, extraordinary, or emergency nature." Thus Congress seems to have expected that the CIA's expenditures for compiling and analyzing, if not gathering, intelligence would be publicly accounted for. If no accounting from the CIA were mandated, there would have been no need to define the particular types of expenditures for which the Director was not required to account.

E. The constitutionality of the accounting procedure: the Richardson case

The failure of the CIA to account publicly for its receipts and expenditures was recently challenged as unconstitutional in a suit brought under the Mandamus and Venue Statute, 28 U.S.C. § 1361, to compel the Secretary of the Treasury to publish a complete Combined Statement. The district court dismissed the complaint for lack of standing and justiciability, but the Court of Appeals reversed, finding that the plaintiff had standing as a taxpayer to raise the claim that insofar as the 1949 Act excused the CIA from reporting its receipts and expenditures it was unconstitutional, and that he had raised a justiciable question. *Richardson* v. *United States*, 465 F.2d 844 (3d Cir. 1972). The Supreme Court granted certiorari on the question of taxpayer's standing and reversed 5-4, holding that the requirements of *Flast* v. *Cohen*, 392 U.S. 83 (1968) had not been met. *United States* v. *Richardson*,— U.S.—, 41 L.Ed.2d 678 (1974).

Although the merits of Richardson's claim were never decided, they were discussed briefly by the Third Circuit in the course of its determination that a substantial constitutional question had been raised, and were again argued by both parties in their briefs to the Supreme Court. The Government maintained that the Statements and Accounts Clause had been intended by the Framers to allow the Congress to decide which Government expenditures should be made public. It noted that Mason, the author of the clause, had originally proposed an *annual* statement of account but that Madison's amendment had substituted the words "from time to time." Mason had opposed this amendment on the ground that it might allow too much secrecy by not requiring a report at regular intervals.[136]

In its brief, the Government urged the Supreme Court to infer from the fact that Madison's language was accepted despite these fears, that a certain latitude in the reporting requirement must have been intended.

Richardson, on the other hand, pointed out that the reason for Madison's amendment was his belief that to require reporting at regular intervals might lead to no reporting at all. This, Madison noted, was what had happened under the Articles of Confederation, which required semi-annual reporting: "a punctual compliance being often impossible, the practice has ceased altogether." [137] Richardson also pointed out to the Virginia debates on the Constitution where Mason again objected to the words "from time to time" as being too "loose," and Lee replied that Mason's concern was "trivial," that the common acceptation of language, short, convenient periods," and that [t]hese who would neglect this provision would disobey the most pointed directions." [138] To this Madison added that:

"[h]e thought it much better than if it had mentioned any specified period; because, if the accounts of the public receipts and expenditures were to be published at short, stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them, and detection of any errors. But by giving them an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent." [139]

Based on this statement, Richardson argued that Madison and Mason were in wholehearted agreement as to the desirability of full disclosure and differed only in their views as to how best to achieve it.[140]

Both Richardson and the Government drew the Court's attention to the language of Article 1 Section 5 Clause 3, which states "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." The Government argued that it would be illogical to allow the Legislature an exception for matters requiring secrecy while not allowing the Executive Branch such an exception. Richardson maintained that the difference in language was intended to reflect the Framers' belief that while some matters may require secrecy, the receipts and expenditures of public money should never be concealed.[141]

The Government further bolstered its interpretation of the Statements and Accounts Clause by citing two instances in which Congress enacted secret appropriations bills prior to its passage of the 1949 Act. The first occurred in 1811 when President Madison requested of Congress a secret appropriation to be used in purchasing parts of Spanish Florida. This was not made public until 1818. The second instance consisted of the secret $2 billion appropriated for the Manhattan Project to develop the atomic bomb during World War II. It should be noted, however, that each of these examples involved one appropriation or series of appropriations for one specific purpose, not an entire system of appropriating money to be used on an annual basis for a particular agency regardless of the goals for which the money will be used. It should also be noted that at least in the case of the Florida appropriations bill, the entire Congress was aware of the acquisition plan, which is not the case when money is appropriated for the CIA.

As its final argument on the merits, the Government cited three other statutes which authorize Congress to exempt certain appropriated funds from the public accounting requirement. The oldest of the statutes, dating from 1793, is 31 U.S.C. § 107, which states:

"Whenever any sum of money has been or shall be issued, from the Treasury, for the purposes of intercourse or treaty with foreign nations, in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the General Accounting Office, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended."

Although this statute allows the President or Secretary of State to certify expenditures without specifying their purposes, it does not become effective until Congress has appro-

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priated money "for the purposes of intercourse or treaty with foreign nations." It does not permit a practice of concealing both receipts and expenditures regardless of the purpose for which they were appropriated, as is done by the CIA.[162]

A second statute cited by the Government was 28 U.S.C. §537, covering expenditures by the Federal Bureau of Investigation for unforeseen emergencies of a confidential character. It provides as follows:

"Appropriations for the Federal Bureau of Investigation are available for expenses of unforeseen emergencies of a confidential character, when so specified in the appropriation concerned, to be spent under the direction of the Attorney General. The Attorney General shall certify the amount spent that he considers advisable not to specify, and his certification is a sufficient voucher for the amount therein expressed to have been spent."

This statute, even more clearly than the previous one, limits the Executive's authority to spend money secretly to cases where Congress has specifically provided for it in a separate appropriations act. This is also true of the third statute relied on by the Government, 42 U.S.C. §2017 (b), regarding appropriations for the Atomic Energy Commission, which states simply:

"(b) Any Act appropriating funds to the Commission may appropriate specified portions thereof to be accounted for upon the certification of the Commission only."

In contrast to the Government's interpretation of the 1949 Act, neither of these statutes purports to confer blanket authority on an Executive agency to ignore the requirements of the Statements and Accounts Clause and the statutes implementing it.[163]

In examining the scope of the Director's authority not to account for sums expended under the 1949 Act, it is important to view this authority in the context of a unique appropriations process applicable to no other agency. When other agency heads give special certification instead of accounting for their expenditures, the public can at least determine the amount secretly spent because the agency's total budget is listed in the Combined Statement, and its normal expenditures are accounted for. In the case of the CIA, its total budget is never known even to Congress, and no receipts or expenditures are listed in the Combined Statement. Thus the 1949 Act as presently applied allows the Director of Central Intelligence far more authority to operate secretly than any other agency head.

This degree of secrecy conflicts with the constitutional mandate of the Statements and Accounts Clause. That Clause requires that at least the total amounts actually spent by the CIA be published in the Combined Statement.[164] Whether greater detail is mandated and, if so, what degree of specificity, are more difficult questions requiring a balance between the interests of national security and the right of the public to know.[165]

V. THE RANGE OF REMEDIES

A. Suits challenging CIA activities

Because of the sensitive nature of the CIA's legitimate functions the courts may be reluctant to entertain challenges to its other activities. If the courts are to provide redress, however, a threshold question to be resolved is that of standing to sue.

(1) Taxpayer's Standing

Although the previously discussed decision of the Supreme Court that Richardson lacked standing rested on narrow grounds, it contained broad language to the effect that Richardson's complaint lay more properly within the province of Congress than of the courts. It has therefore been argued that the decision closed the door to any judicial enforcement of the Statements and Accounts Clause.

The majority opinion in *Richardson* held only that the first requirement of *Flast* v. *Cohen*, 392 U.S. 83 (1968), had not been met, in that the plaintiff had failed to establish a logical nexus between his status as a taxpayer and the statute he was attacking. To establish this nexus, a taxpayer must challenge an exercise of the taxing and spending power of Congress. Technically, the *Richardson* holding does not foreclose a plaintiff who seeks not only to enforce the Statements and Accounts Clause but also to enjoin the expenditure of money by the CIA unless openly appropriated and accounted for, from claiming taxpayer's standing.

However, in dictum the Court conceded the correctness of Richardson's argument that if he lacked standing then no one could bring such a suit. The Court stated:

"It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."

In view of this language, it appears doubtful that another plaintiff would be held to have standing even on a more expertly pleaded complaint.

(2) Congressman's standing

To the extent that the activities engaged in by the CIA have exceeded the scope of its statutory authority, one possible remedy is a Congressman's lawsuit. Congressman's standing has been held to rest on a broader basis than taxpayer's standing and to include challenges to the conduct of foreign policy. *Mitchell* v. *Laird*, 488 F.2d 611 (D.C. Cir. 1973).

In *Coleman* v. *Miller*, 307 U.S. 433 (1939), a leading case on legislator's standing, the Supreme Court held that twenty members of the Kansas Senate had standing to challenge the casting of a deciding vote on the ratification of the Child Labor Amendment to the United States Constitution by the Lieutenant Governor of Kansas. The court noted that the twenty Senators had all voted against ratification of the amendment, and that it would not have been ratified but for the vote of the Lieutenant Governor. The basis for standing was the legislators' interest in protecting their votes. This interest was also found to constitute a basis for standing in a suit by Senator Kennedy challenging President Nixon's use of the pocket veto. *Kennedy* v. *Sampson*, 364 F. Supp. 1075 (D.D.C. 1973).

A broader basis for standing was found in *Trombetta* v. *State of Florida*, 353 F.Supp. 575 (M.D. Fla. 1973) where members of the Florida legislature sought a declaratory judgment as to whether a provision in the Florida Constitution governing ratification of amendments to the United States Constitution conflicted with Articles V and VI of the Constitution. There the legislators were attempting to protect votes as yet uncast, and the court based its finding of standing on the "unresolved constitutional dilemma" confronting them.[166]

Other grounds for findings of Congressmen's standing have included their duties to consider whether to impeach, to make appropriations for the Vietnam war, and to take other legislative actions.[167] *Mitchell* v. *Laird*, *supra*. However, even when the standing requirement is met, a Congressman's suit challenging the conduct of foreign policy may be dismissed as raising a non-justiciable political question. *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (2d Cir. 1973).

The question of Congressmen's standing is currently being tested in a suit filed in December, 1974 by Congressman Michael Harrington against William E. Colby, Henry Kissinger and William E. Simon. The complaint seeks four types of declaratory and injunctive relief: 1) a declaration that the performance of any non-intelligence related foreign activities by the CIA or any domestic surveillance break-ins or wiretapping by the CIA is illegal and an injunction against all such activity; 2) a declaration that the expenditure of funds or use of services under the purported authority of the exemptions contained in the Act is illegal when used for any of the purposes set forth in (1) above and an injunction against such expenditures; 3) a declaration that the failure of the CIA to report the activities listed in (1) above in the Federal Register in compliance with the Freedom of Information Act (5 USC §552) is illegal and a mandatory injunction requiring such reporting; and 4) a declaration that the failure of defendants to report in the Combined Statement receipts and expenditures used for the activities listed in (1) above is illegal and a mandatory injunction requiring such reporting. The theory of the Harrington complaint is that the 1949 Act exempts from reporting only such expenditures by the CIA as are spent in intelligence-related activities and that any exemptions taken pursuant to the 1949 Act for purposes other than those specified therein are illegal and should be enjoined.

In order to establish standing, the complaint alleges that the plaintiff Congressman's interest in a declaratory judgment stems from his constitutional duties (1) to consider impeachment of Colby, Kissinger and other civil officers of the United States (2) to consider and vote for legislation proscribing the activities of the CIA, (3) to consider and vote for legislation proscribing or limiting the use by the Agency of any public funds and (4) to take other legislative actions relative to the activities of the Agency. It further alleges that Congressman Harrington has an interest in preserving the constitutional powers and prerogatives of Congress and that he has an interest in insuring that the Executive seek and obtain express and specific appropriations from Congress for the Agency except as the Executive may have been constitutionally authorized by statute to do otherwise. Related to this interest is the right as a Congressman to be informed whether the funds appropriated by any given appropriations bill may be expended by the CIA, and to participate in the legislative process upon the basis of such knowledge. Similarly the complaint asserts Harrington's interest as a Congressman in having the CIA comply with reporting and transfer provisions except insofar as it is legally and constitutionally exempt from them. The cas

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and specificity with which standing is pleaded reflects the concern of Harrington's counsel that standing will be an important threshold issue in the case. However, even if he is held to have standing, the case might nonetheless be dismissed on "political question" grounds.

(3) Congressional Grant of Standing to Sue

It seems clear that if there is to be effective control of domestic surveillance activities of the CIA, standing to sue will have to be given to individual citizens who have been the targets of such activity.

An analogy can be made to military surveillance of civilian political activities.[168] In our view, the domestic surveillance activities of the CIA, like those of the Army, exceeded its statutory authority. Some of the reported activities such as warrantless electronic surveillance would of course be unconstitutional even if not contrary to statute, if they involve domestic security. But the decision of the Supreme Court in *Laird* v. *Tatum*, 408 U.S. 1 (1972), requiring a showing of direct injury or the threat of imminent injury, makes it difficult, if not impossible, effectively to control such surveillance activities under present law.[169]

It seems clear that if there is to be ef-

The proposed Freedom From Surveillance Act of 1973 (S. 2318, 93rd Congress, 1st session) which would prohibit surveillance by the military, serves as an excellent model of the type of legislation which appears to be needed with respect to CIA activities impinging upon the rights of individual citizens. The proposed statute first sets forth a broad, but nonetheless precise, description of the prohibited activities and the penalties imposed and then narrowly describes the exceptions to the general rule.

New legislation which would not only impose sanctions [170] but would give targeted citizens standing to sue is, therefore, clearly desirable. Such persons should be granted the following rights, at a minimum:

1. The right to bring a civil action for damages (including punitive damages) and/or for equitable relief regardless of the actual amount of pecuniary damage suffered.

2. The right to recover attorneys' fees if plaintiff substantially prevails.

3. The right to bring suit in the district where the violation occurs, where plaintiff resides or conducts his business, or in the District of Columbia.

Other provisions which might be considered would be: giving any case brought pursuant to the statute docket precedence and requiring the Government to answer the complaint within thirty days rather than sixty days.[171] The proposed Freedom From Surveillance Act, *supra*, also includes a provision authorizing class actions to enjoin surveillance by the military, and such a provision would seem to be equally desirable in the case of the CIA.

Finally, in view of the trepidation with which the courts have habitually dealt with matters relating to national security and foreign relations, particularly where the CIA is involved, it might be desirable to include provisions expressly granting the trial court power to review *in camera* relevant documents as to which a privilege is claimed (this power is now granted under the Freedom of Information Act, as recently amended) and making clear plaintiff's right to ascertain through speedy and effective discovery procedures whether improper domestic surveillance has, in fact, occurred.

B. Stricter congressional oversight

As a result of disclosures concerning CIA domestic and foreign activites, many bills and resolutions have been introduced in Congress to define and limit the CIA's functions, to restrict its domestic operations and to provide for more effective congressional oversight over its foreign political activities.[172]

It is easier to agree in principle that each of these is desirable than to put in statutory form a clear, workable application of the principle. We will discuss below some of the approaches presented.

(1) Domestic activities

A number of bills seek to eliminate domestic surveillance operations. In S. 3767, 93rd Cong., 2nd Sess. (1974), the CIA is specifically unauthorized to:

"(1) carry out, directly or indirectly, within the United States, either on its own or in cooperation or conjunction with any other department, agency, organization, or individual any police or police type operation or activity, any law enforcement operation or activity . . ."

In addition, the CIA would not be permitted to:

"(2) participate, directly or indirectly, in any illegal activity within the United States.[173]

Others (e.g. S. 2597 93rd Cong., 1st Sess. [1973]) create exceptions for "carrying on within the United States activities necessary to support its foreign intelligence responsibilities." This would appear to provide a broad loophole which would not effectively bar such activities as opening the mail of Bella Abzug while she was a practicing attorney, and keeping counter-intelligence files on her activities and those of three other members of Congress (see Point 11B, *supra*).

Some members of the Committees preparing this report believe that such an exception would be appropriate if it were coupled with a *proviso* that internal security functions in support of foreign intelligence activities would be impermissible.

(2) Congressional Review of Foreign Political Activities: Prior Approval or Later Disclosure

The amendment to the Foreign Assistance Act of 1961, enacted as Public Law 93–559, Dec. 30, 1974, adding Sec. 663, requires only a report by the President as to CIA foreign operations "other than activities intended solely for obtaining necessary intelligence," to the appropriate committees of Congress, including the Senate Foreign Relations and the House Foreign Relations Committees. This Act does not, however, mandate authorization by Congress or any committee.

Some of the proposed legislation goes farther. H.R. 9511, 93rd Cong., 1st Sess. (1973), would prevent "covert" action without written approval of an oversight committee of Congress. "Covert" action is inadequately defined as being "the commonly accepted understanding of that term within the intelligence community of the Federal Government."

In H.R. 16,905, 93rd Cong., 2d Sess. (1974), funds are not to be appropriated for intelligence activities unless such operations are authorized by further legislation. The approach of this bill is to set up a congressional council which would have powers somewhat similar to the National Security Council. The limitation imposed by requiring authorization of intelligence operations by legislation enacted after the date of this Act would have consequences perhaps unintended by the draftsmen. It would appear that the CIA cannot receive funds for any activity unless Congress as a whole so authorized by vote, which would in effect impair any secret operations including intelligence-gathering.

(3) Composition and Powers of Oversight Committees

Many different approaches have been suggested as to the composition of a joint committee to oversee the Agency's operations. One bill seeks a fourteen member committee, Senate, each to be divided among the two parties (H.R. 16,905); another seeks twenty-five members (S. 1547, 93rd Cong., 2nd Sess. [1974]).

In H.R. 16,905, the joint committee is authorized to conduct continuing studies and investigations of all security agencies, namely, the CIA, FBI, Secret Service, Defense Intelligence Agency, the National Security Agency and all other intelligence departments and agencies of the Federal Government.

Other bills have sought (1) detailed and regular reports to congressional committees (H.R. 7596, 93rd Cong., 1st Sess. [1973]); (2) increased powers of congressional committees to obtain as a matter of law, further information from the CIA (H.R. 13,798, 93rd Cong., 2nd Sess. [1974]) "Central Intelligence Agency Disclosure Act");[174] and (3) further study and correlating of information available to Congress relating to intelligence (S. Con. Res. 23, 93rd Cong., 1st Sess. [1973]).

It is apparent that congresional oversight has many variations. Regular reporting and submission of a proposed budget to a carefully organized joint committee representing all segments of Congress, should be a minimum.

VI. RECOMMENDATIONS

1. Despite the present restriction of the CIA to the foreign intelligence field and despite the prohibition against its exercising any internal security functions, its domestic activities—viewed as legitimate by the Agency—so pervade our national life and society as to make such restriction and prohibition almost meaningless. A revision of the National Security Act so as to define more precisely both the authority of, and the restrictions on, the Agency is plainly necessary.

Legislation for this purpose referred to in CIA Director William E. Colby's report to the Senate Appropriations Committee as acceptable to the CIA is inadequate. This legislation would add the word "foreign" before the word "intelligence" wherever it appears in the Act, and would add a prohibition against "any domestic intelligence operations or activity" to the existing ban against the exercise of police, law-enforcement or internal security functions. However, this prohibition would be "supplemented" by an additional proviso preserving for the CIA the right to carry on within the United States any activity "in support of its foreign intelligence responsibilities . . ."[175] It is difficult to determine which of the domestic activities now regarded by the CIA as not prohibited even though they appear to involve internal security functions, would be curtailed under such a proviso.

It is recommended that new legislation be formulated, which would (a) clearly define the terms "internal security operation" and "domestic intelligence operation" in accordance with Recommendations 2 and 3 below, and (b) permit no exceptions to the ban on such operations by the CIA.

2. In light of recent testimony about CIA domestic activities, special attention should be given in any new legislation to the protection of First and Fourth Amendment rights of speech, association and privacy. In our view, CIA surveillance within the United States of any person who is not an employee of the CIA constitutes an "internal security function" prescribed by its present charter. Equally unlawful is the CIA's maintenance and dissemination of information concerning individuals in this country with no clear and direct involvement with foreign powers. Such CIA activities have a serious potential for infringement of First Amendment rights and are not necessary to the Agency's authorized objectives.

In addition, the exemption of the CIA from the restrictions contained in the Privacy Act of 1974 [176] should be revised. That

Footnotes at end of article.

alien about whom records are kept by a federal agency may inspect and make copies of such records, request corrections, and add to the records a statement of the reasons for his disagreement if the agency refuses to make such corrections. Exceptions to the requirement of allowing individuals to inspect and correct their own records are made, *inter alia*, for (a) investigative material compiled by a law enforcement agency; (b) information specifically authorized by Executive order to be kept secret in the interest of national defense or foreign policy; and (c) records maintained by the CIA. The total exemption for any records kept by the CIA constitutes a broad and unnecessary loophole which severely weakens the protection to individual privacy which the Act otherwise affords. This exemption should be limited to cases where the CIA can demonstrate that the individual making the request has a clear and direct connection with a foreign power.

3. The responsibility placed upon the Director to protect intelligence sources and methods from unauthorized disclosure should be eliminated. Mr. Helms and Mr. Colby disagree as to how the present provision is to be interpreted, but however interpreted, the provision has been used to justify CIA domestic activity—such as the Ellsberg profile, the insertion of CIA agents into domestic "dissident" groups, and CIA investigations within the Government of unauthorized disclosures of classified intelligence—which in our view conflicts with the prohibition against the exercise by the CIA of internal security functions. This domestic activity is premised on an overly broad definition of "intelligence" which encompasses not only CIA files and sources, but all Government documents and sources. Any protection of domestic sources and methods other than routine safety measures which may be necessary must be carried out by the FBI. With regard to sources and methods outside the United States, the authority to protect them is implied as part of the Agency's intelligence-gathering function.

4. Neither the National Security Act of 1947 nor the Central Intelligence Act of 1949 contains any express authority for the CIA to undertake foreign political operations. The amendment to the Foreign Assistance Act requiring the President promptly to report any such operation to the appropriate congressional committees represents an attempt to increase the CIA's accountability to Congress for its overseas activities. Congress has a constitutionally-based responsibility as a partner with the Executive in the establishment of foreign policy; the oversight committee should therefore consider any CIA political operation in the light of the foreign policy goals of Congress. If the committee members find that a particular CIA acitvity may conflict with these goals, congressional policy should be ascertained without revelation of specific details to Congress as a whole.

In order for the appropriate congressional committee to exercise its oversight responsibilities effectively under the 1974 amendment to the Foreign Assistance Act, the Act should be amended to require that the President's report on any proposed foreign political activity be defined to include a detailed proposed budget to be followed at a later date by an account of actual expenditures. Such a budget could assist the committee members in analyzing the scope and objectives of the proposed operations.

5. The funding process for the CIA is unique, in that the annual budget is discussed and voted upon only by one intelligence sub-committee of the Appropriations Committee in each house and is then divided up by the committee chairmen and disguised in various other appropriations so that the Appropriations Committees of the Congress as a whole do not know when, much less what total amount, they are voting for the CIA budget. However, the Constitution requires that at least the total budget must be separately and knowingly appropriated by Congress. The Constitution further requires the Executive to make a regular statement of account of all public money spent; thus, the total sum actually disbursed by the CIA should be published in the Combined Statement.[17]

The entire CIA budget should be reviewed by the joint congressional committee responsible for CIA oversight. This committee should be equipped with an adequate information-gathering staff and with enough professional accountants to allow it to perform meaningful budgetary review, and should require regular and special reports from the CIA. Budget oversight by this committee should include serious study of the CIA's proprietary corporations.

6. The legislation required to implement the above recommendations should confer standing to sue on injured citizens, such as those who have been the objects of surveillance. The holding of the Supreme Court in *Laird v. Tatum* to the effect that Government surveillance does not in itself create a chilling effect on First Amendment rights, has diminished still further the likelihood that a citizen who has been the object of CIA surveillance would be accorded standing under current constitutional standards, and has augmented the need for a new statutory enactment. It should be understood, however, that such legislation must not be interpreted as detracting from any presently established substantive rights, whether statutory or constitutional.

Committee on Civil Rights

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Benjamin Ira Gertz.
Joel B. Harris.
George M. Hasen.
David L. Katsky.
Alexander A. Kolben.
Larry M. Lavinsky.
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Edith Lowenstein.
Cyril H. Moore, Jr.
Bruce Rabb.
Jerry Slater.
William Sterling, Jr.
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Committee on International Human Rights

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Richard Paul Kramer.
Andre W. G. Newburg.
Allan S. Parter.
Ronald Pump.
Deborah L. Seidel.
Edward Sheldon Stewart.
Leonard M. Wasserman.
Richard A. Whitney.
H. Donald Wilson.

Dated: March, 1975.

FOOTNOTES

[1] See, *e.g.*, letter dated 4/25/47 from Allen Dulles to Chan Gurney, Chairman of the Committee on Armed Forces, reproduced in *National Defense Establishment (Unification of the Armed Services) Hearings before the Committee on Armed Services, United States Senate, 80th Cong., 1st Sess. On S. 758*, at p. 94.

[2] Wise & Ross, The Invisible Government (New York, Random House, 1964) at 91–93. With the creation of the OSS, the United States for the first time became engaged in intensive strategic intelligence research, and extensive and covert activity, on a worldwide scale. Ransom, Central Intelligence and National Security (Cambridge, Harvard Press, 1958) at 64.

[3] Hilsman, Strategic Intelligence and National Decisions (1956) at 29. The Joint Chiefs of Staff are credited with developing the plan eventually adopted by President Truman in the Statement of Lt. Gen. Hoyt S. Vandenberg, Director of Central Intelligence, reproduced in *National Defense Establishment*, *supra* at n. 1, 491, 494.

[4] Presidential Directive of 1/22/46, 3 C.F.R. 1080 (1943–48 Comp.). See 11 Fed. Reg. 1337, 1339 (2/5/46); Kirkpatrick, The Real CIA (1968) at 74; Ransom, *supra* at n.2, at 75.

[5] Wise & Ross, *supra* at n.2, at 93; Walden, *The C.I.A.: A Study in the Arrogation of Administrative Powers*, 39 Geo. Wash. L.Rev. 66, 70 (1970).

[6] Wise & Ross, *supra*, at 93; Walden, *supra* at n.5, at 70.

[7] Walden, *supra*, at 71.

[8] H.R. Rep. No. 2734, 79th Cong., 2d Sess. 4 (1946); see, Walden, *supra*, at 70–72.

[9] 50 U.S.C. § 401 *et seq.*

[10] Rear Admiral Roscoe H. Hillenkoeter became its first Director on September 15, 1947.

[11] 50 U.S.C. § 403(c) (1964); Walden, *supra*, at 73.

[12] 50 U.S.C. § 403(c) (1964); Ford, Donovan of OSS, (Boston, Little Brown & Co., 1970) at 316–17. Professor Walden notes that heads of other government agencies were authorized in 1950 to suspend any employee "when deemed necessary in the interest of national security," 5 U.S.C. § 22–1 (1964), but the broad authority granted to the Director of Central Intelligence is paralleled only by that conferred upon the Secretary of Defense with respect to employees of the National Security Agency, 50 U.S.C. § 833 (1964). Walden, *supra*, at 74.

[13] 50 U.S.C. § 403a–§ 403j (1964).

[14] *Id* at § 403g.

[15] *Id* at § 403j(b).

[16] In other words, the Director can spend money from the CIA's appropriations on his personal voucher. The CIA is said, however, to have taken administrative measures strictly to control its expenditures and to require a complete internal accounting for the use of all its funds, vouchered or unvouchered. Ransom, *supra* at n.2, at 81, 263, n.5. See Dulles, The Craft of Intelligence (New York, Harper & Row, 1963) at 259.

[17] 50 U.S.C. § 403(h).

[18] *Id.* at § 403(d)(5). See e.g. *Hearing before the Committee on Armed Services, United States Senate, 93rd Cong., 1st Sess., on Nomination of William E. Colby to be D.C.I., at* 14, 19.

[19] Wise & Ross, *supra*, n.2 at 94–5; Marchetti & Marks, The C.I.A. and the Cult of Intelligence (New York, Knopf, 1974) at 22–23. According to one authority, the NSC gave the CIA responsibility for "political, psychological, economic and unconventional warfare operations," Harry Rositzke, "America's Secret Operations: A Perspective," 53 *Foreign Affairs* 334, 341 (1975). The CIA's real role is therefore spelled out in a series of top-secret NSC directives ("NSCIDs"). Marchetti & Marks, *supra*, at 323. The fact that the Director participates in NSC meetings suggests that the scope of Agency operations may be largely self-determined. Ranson, *supra* at n.2, at 82.

[20] According to Marchetti & Marks, *supra*, at 22, this was accomplished by means of a secret National Security Council Director, NSC 10/3.

[21] Marchetti & Marks, *supra*, at 23.

[22] Id.

[23] *Id.* at 58; see Schwartzman, *infra* at n.86,

IV. AMENDMENTS TO THE NATIONAL SECURITY ACT OF 1947

Summary of Issues

The Central Intelligence Agency and the National Security Council were created by the National Security Act of 1947, the larger purpose of which was to consolidate the armed serves into what became the Department of Defense. The Act contains many ambiguities and uncertainties concerning the powers and duties of the CIA and NSC. For this reason, proposals are being considered to amend the Act to make these powers and duties more explicit.

Specific Issues Relating to Amendment of the National Security Act of 1947.

1. Section 402 (a): Membership of the NSC

The function of the NSC is to "advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security..." (emphasis added) But as William Watts noted in his testimony before the House Select Committee on October 30th,

> (T)he National Security Council as presently constituted has no statutory representative, other than the president, who can speak to domestic considerations and concerns. In a world where foreign policy in many areas is also domestic policy (oil and grain are obvious examples), this is, in my view, a serious but correctable weakness. It places an unfair burden on the president, since only he can take fully into account the domestic consequences of foreign policy actions.

Mr. Watts suggests, therefore, that this section be amended to add the Secretary of the Treasury as a statutory member of the NSC.

In support of this proposal, it may be argued that the NSC, as presently constituted, cannot promote the integration of domestic and foreign policies because none of its members has an institutional interest in promoting domestic considerations. Although no official can adequately represent the entire gamut of domestic interests, the macro-economic responsibilities of the Secretary of the Treasury give him a broader perspective on domestic policy concerns than any of his Cabinet colleagues.

Further, adding the Secretary of the Treasury to the NSC would be a recognition of the increasing importance of international economic policy, and the shifting emphasis in security policy from military strength to questions of resource allocation and market control. The intelligence community has been criticized for not putting sufficient emphasis on economic issues. This weakness might be corrected by giving the Secretary of the Treasury a statutory voice in directing intelligence collection and evaluation efforts.

In opposition to this proposal, it may be argued that presidents have frequently asked domestic officials to participate in NSC meetings whenever appropriate. Every president has re-shaped the NSC to fit his own style of decision-making, and this flexibility should not be reduced by unnecessary changes in the formal membership of the NSC. The NSC is essentially an advisory body to the president; the more the Congress specifies its membership and activities, the greater the likelihood that presidents will find it uncongenial and ignore it.

2. Section 402(b): Functions of the NSC

In Sections 402(a) and 402(b), the Congress provided that the NSC is to advise, to assess and appraise, to consider policies, and to make recommendations to the President. There is no explicit statement that the NSC is to have any operational authority.

Section 402(b) does provide, however, that the NSC shall perform "such other functions as the President may direct..." and Section 403(d) provides that the CIA shall perform its services, functions and duties "under the direction of the National Security Council..."

It is presently being considered whether the NSC should be an advisory or operational body. If it is concluded that the NSC should only be an advisory body to the President, it may be recommended that this section be amended by (1) eliminating the reference to "such other functions...," or (2) specifying that these other functions shall not include authorizing or directing operations or activities not undertaken primarily or solely for the purpose of gathering foreign intelligence.

If it is concluded that the NSC should remain involved in covert action operations but that the final responsibility must rest on the President, it may be recommended that this section be amended to provide that the NSC shall direct no operational activity without the explicit, personal and written approval of the President. Such a provision might duplicate the requirement for presidential approval imposed by the Foreign Assistance Act Amendments of 1974, but it would specify that the NSC is to have no operational authority independent of the President.

3. Sections 403(a) and 403(b): The Director and Deputy Director of Central Intelligence

Section 403(a) provides that either the Director or Deputy Director, but not both, may be nominated from among "commissioned officers of the armed forces, whether in an active or retired status." Section 403(b) contains various provisions concerning the status of a commissioned officer occupying either position.

Traditionally, either the DCI or his Deputy has been a commissioned officer. It may be concluded that this is undesirable because any military official, whatever his intentions, must inevitably be influenced by his years of experience in the armed forces. It may be recommended, therefore, that the separation of the CIA from the military be enforced by repealing Section 403(b) and amending Section 403(a) to require that both the DCI and his Deputy be civilians.

4. Section 403(c): DCI authority to fire CIA employees

Section 403(c) provides that, notwithstanding any other provision of law,

> The Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States....

It may be concluded that this authority is too broad and that CIA employees should enjoy the rights of other government employees to the fullest extent possible.

If so, it may be recommended that this section be amended to provide that (1) the DCI's discretionary authority is limited to cases in which employees are fired for security reasons; (2) in such cases, the employee shall have the right to appeal to the President for reconsideration and reinstatement; and (3) before acting on such an appeal, the President shall have the advice and recommendation of the Attorney General.

5. Section 403(d): The intelligence functions of the CIA

Section 403(d) provides that the CIA shall undertake various functions related to intelligence. Proposals have been made to specify that the CIA shall only undertake programs related to foreign intelligence.

The DCI, Mr. Colby, supported such an amendment in testimony before the House Armed Services Committee on 22 July 1974:

> I fully support this change. While I believe the word "intelligence" alone in the original Act was generally understood to refer only to foreign intelligence, I concur that this limitation of the Agency's role to foreign intelligence should be made crystal clear to its own employees and to the public. I hope that this amendment will reassure any of our fellow citizens as to the Agency's true and only purpose.

6. Section 403(d): NSC direction of the CIA

Section 403(d) provides that the CIA shall perform specified functions "under the direction of the National Security Council."

On the basis of its hearings and investigation, it may be decided that the relationships among the President, the NSC, and the CIA should be clarified by amending this section to provide that the CIA's activities shall be undertaken at the direction of the President, upon the recommendation of or after consultation with the National Security Council.

7. Section 403(d)(3): Intelligence collection by the CIA

Section 403(d)(3) provides that the CIA shall "correlate and evaluate intelligence relating to the national security and provide for the appropriate dissemination of such intelligence within the Government..."

There is no explicit provision in this section or elsewhere in law which authorizes the CIA to collect intelligence.

Whatever the original intention or expectation, however, the CIA has been involved in intelligence gathering since its creation. This fact may be acknowledged by amending this section to provide that the CIA shall "collect" as well as "correlate and evaluate" intelligence.

8. Section 403(d)(3): Domestic activities of the CIA

Section 403(d)(3) provides that the CIA "shall have no police, subpena, law-enforcement powers, or internal-security functions."

On the basis of the Rockefeller Commission report and the Congressional investigations, it may be concluded that this section requires clarification. It may be recommended, therefore, that the section be amended to provide that the CIA shall engage in no activities within the United States except:

1. to conduct personnel investigations and protect the security of its facilities;

2. to provide foreign intelligence information to other federal departments and agencies only upon the written, public request of the Attorney General or the Secretary of the Treasury, and

3. to solicit information voluntarily from United States citizens and residents.

Mr. Colby has indicated support for such an amendment.

It may also be recommended that:

1. the above limitations are not meant to impede the lawful activities of the CIA at its headquarters and other offices within the United States,

2. any domestic activities undertaken pursuant to (1)-(3) above shall be subject to the laws of the United States, and

3. the CIA shall submit an annual report to the Congress describing and providing the statutory basis for all domestic activities undertaken pursuant to (1)-(3) above.

9. Section 403(d)(3): Protection of intelligence sources and methods

Section 403(d)(3) provides that the DCI "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

The CIA has argued that this provision imposes an important responsibility upon the DCI without giving him the necessary authority. In his 1974 testimony before the House Armed Services Committee Mr. Colby stated:

> Under existing law, the Director is responsible for developing such internal administrative controls as are possible and appropriate to protect against unauthorized disclosures, but if such a disclosure is identified, his only recourse beyond internal disciplinary action, including termination of an employee, would be to report the matter to appropriate authorities for examination of possible legal action....
>
> ...I am of the personal opinion that additional legislation is required on this subject to improve our ability to protect intelligence sources and methods against unauthorized disclosure...the specifics of my recommendations on this subject are still under active consideration within the Executive Branch, so that an appropriate Executive Branch recommendation can be made to the Congress.

For these reasons, it may be recommended that some new authority must be provided to enable the DCI to meet his responsibility under this section.

On the other hand, it may be recommended that no additional authority be provided to the DCI, or even that this provision be repealed. It is unclear what kinds of information are encompassed by "intelligence sources and methods" and whether the DCI's authority is limited to information in the custody of CIA or to information held throughout the intelligence commmunity. Instead of attempting to clarify the provision, it may be recommended that it be eliminated as a possibly contentious issue which is unnecessary for the protection of intelligence information.

10. Section 403(d)(4): "Additional services of common concern"

Section 403(d)(4) provides that the CIA shall perform

> for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally.

It may be determined that the provisions of Section 403(d)(4) are unnecessary and that this section be repealed.

11. Section 403(d)(5): "Such other functions and duties"

Section 403(d)(5) provides that the CIA shall perform

> such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.

It is this provision which the CIA has cited as its statutory authority for conducting covert action operations.

If the HSC and SSC believe that the CIA should not engage in any covert action programs, they may recommend that this section be amended to provide that no activities undertaken pursuant to this section shall be for the purpose of influencing, determining, or otherwise affecting the policies, officials, programs, organizations, or actions of any foreign government or entity.

If the HSC and SSC conclude that covert actions should not be prohibited by law but that they should be considered and approved more systematically than at present, they may recommend that this section be amended to provide that any such functions and duties are to be undertaken only upon the specific, written direction of the President, upon the recommendation of or after consultation with the National Security Council.

The HSC and SSC may also recommend that any activities undertaken by the CIA under the authority of this section shall be reported to the Congress under the same reporting requirements established by the Foreign Assistance Act Amendments of 1974. Such a provision might be redundant, but it could be felt to minimize the possibility of major CIA activities escaping Congressional notice. Mr. Colby has expressed his general support for such a reporting requirement.